(8)

No. 99-1884-CFX Title: Lackawanna County District Attorney, et al., Petitioners
v.
Edward R. Coss, Jr.

Docketed:
May 24, 2000 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	May 24 2000	Petition for writ of certiorari filed. (Response due June 23, 2000)
	Jun 23 2000	Brief of respondent Edward R. Coss in opposition filed.
	Jun 23 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Jul 5 2000	DISTRIBUTED for Conference of September 25, 2000
	Oct 2 2000	REDISTRIBUTED for Conference of October 6, 2000
	Oct 10 2000	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Oct 10 2000	Petition GRANTED. SET FOR ARGUMENT February 20, 2001.
		**********
	Nov 22 2000	Brief amici curiae of Colorado, et al. filed.
	Nov 24 2000	Joint appendix filed.
	Nov 24 2000	Brief of petitioners Lackawanna County District Attorney, et al. filed.
	Nov 29 2000	LODGING consisting of twenty copies of documents submitted by counsel for amici Colorado, et al.
	Dec 8 2000	Motion of Colorado for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 20 2000	Record filed.
	Dec 27 2000	Brief of respondent Edward R. Coss, Jr. filed.
	Dec 28 2000	Record filed.
	Dec 29 2000	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jan 19 2001	CIRCULATED.
	Jan 22 2001	Motion of Colorado for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 20 2001	ARGUED.

Supreme Court, U.S.
FILED

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No. 99-

IN THE

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

EDWARD R. COSS, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the custody requirement of the federal habeas corpus statute preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the petitioner is presently in custody?

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Third Circuit, filed February 29, 2000, which reversed the United States District Court for the Middle District of Pennsylvania and conditionally granted the petition for habeas corpus is reported at 204 F.3d 453 (3d Cir. 2000) and is unofficially reported at 2000 WL 225898 (3d Cir. (Pa.), Feb 29 2000) (No. 98-7416). A copy of said opinion is reprinted in Appendix A at 1a.

A previous opinion entered on June 28, 1999 by the United States Court of Appeals for the Third Circuit, would have reversed the United States District Court for the Middle District of Pennsylvania, but for different reasons, and would have conditionally granted the petition for habeas corpus. Said opinion has not been officially published, but is unofficially reported at 1999 WL 495123 (3d Cir. (Pa.), June 28, 1999) (No. 98-7416). A copy of said opinion is reprinted in Appendix B at 50a.

By order dated July 30, 1999, rehearing was granted, the previous opinion of June 28, 1999 (Appendix B) was vacated and the cause was listed for rehearing *en banc*, resulting in the opinion entered on June 28, 1999 (Appendix A). This order dated July 30, 1999 has not been officially published but is unofficially reported at 1999 WL 566730 (3d Cir. (Pa.), July 30, 1999) (No. 98-7416). A copy of such order is reprinted as Appendix C at 94a.

The orders and memorandum opinion of the United States District Court for the Middle District of Pennsylvania denying the instant habeas petition are unpublished and are reprinted herein as Appendix D at 95a.

STATEMENT OF JURISDICTION

The judgment or order sought to be reviewed was entered February 29, 2000 (Appendix A at 1a).

Rehearing was not sought with respect to the judgment or order sought to be reviewed; however an order respecting rehearing of the previous judgment and opinion entered on June 28, 1999 by the United States Court of Appeals for the Third Circuit was entered by the United States Court of Appeals for the Third Circuit on July 30, 1999 and is reprinted herein as Appendix C at 94a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241(c)(3), which provides:

> The writ of habeas corpus shall not extend to a prisoner unless —
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Edward R. Coss, Jr. brought this habeas corpus action pursuant to 28 U.S.C. § 2254. The United States Court of Appeals for the Third Circuit reversed the District court's denial of relief and conditionally granted habeas corpus relief by opinion and order entered on February 29, 2000. Rehearing of such judgment was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Respondent is a multiple criminal offender whose extensive criminal history is detailed in Appendix A at pages 31a-34a. These habeas corpus proceedings raise claims of constitutional error based upon isolated segments of that criminal history upon which respondent relies to support for his federal *habeas* contentions that:

> (a) because one of his former convictions, a 1986 conviction for simple assault, for which he is no longer incarcerated or under any parole restraint, was tainted by constitutional infirmity arising as the result of ineffective assistance of trial counsel, and
>
> (b) because that former 1986 conviction for simple assault was improperly considered when he was sentenced for a subsequent offense,

the term of incarceration for the subsequent offense violates respondent's constitutional rights.

The former conviction occurred in 1986 following a jury trial for simple assault. It resulted in a two year prison sentence which began in 1986 and ended in 1988 at which time respondent was released from prison. Thus, long before the present habeas proceedings began, respondent was no longer serving any sentence for the 1986 simple assault conviction; the sentence for that conviction had been fully served.

Subsequently, in 1990, respondent was tried and convicted in the Pennsylvania courts for an offense which occurred following his release from prison and which was entirely unrelated to the 1986 simple assault conviction for which his state prison sentence had already been completed. Respondent contends (and the Court of Appeals for the Third Circuit, on a basis which is not entirely clear, agrees with such contention) that his current sentence which he presently is serving for the unrelated 1990 conviction was enhanced by reason of his long-since-completed 1986 conviction. Based upon respondent's further claim that the trial resulting in his 1986 conviction was tainted by ineffective assistance of trial counsel, respondent argues that the sentence for his 1990 conviction was adversely and unconstitutionally affected by the 1986 simple assault conviction, entitling him to federal habeas relief.

Through federal habeas corpus proceedings commenced by a petition filed September 15, 1994, Respondent seeks to litigate claims of constitutional error from a trial which resulted in a two-year prison sentence imposed upon him in 1986; a sentence which, by reason of having been fully served and respondent released from custody, expired in 1988.

REASONS FOR GRANTING THE WRIT

There are three separate reasons why the writ should be granted. Each of these reasons touches upon a question this Court expressly declined to answered in deciding *Maleng v. Cook*, 490 U.S. 488, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). Utilizing the rationale employed in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and its progeny, the *Maleng* court approved, in principle, review for habeas challenges to prior convictions which enhance a current sentence. However, the Court expressly left open the question of the extent to which prior convictions were subject to such attacks. *See Maleng v. Cook*, 490 U.S. 494.

In the three aspects next immediately listed, each of which will be discussed in turn and in detail, the Third Circuit opinion in this case points to the need for resolution of the issue left open in *Maleng*:

(1) It has become apparent, through the passage of time, that the Court's determination, as expressed in *Melang v. Cook*, not to express a definitive view on the extent to which an expired sentence may be challenged in the context of an attack on the current sentence it was used to enhance, has ripened into a problem of major significance; one which the courts of the several circuits have been unable to resolve uniformly.

(2) The conflict which exists among the courts of the several circuits concerning the manner in which the question left open by *Melang v. Cook* should be answered has resulted in a situation where the entitlement of a prisoner to secure relief under the federal habeas corpus acts has become largely dependent upon the circuit in which the prisoner's habeas corpus petition is filed.

(3) Recent congressional enactments which purport to place a strict one-year time limitation upon applicants for federal habeas relief tend strongly to warrant a definitive expression from the Court as to whether such congressional expression should be regarded as inveighing towards the answer to the question left open by *Melang v. Cook*.

I. LACK OF UNIFORMITY OF DECISIONS AMONG THE SEVERAL CIRCUITS.

One of the central[1] questions in federal habeas corpus jurisprudence remains without a clear answer from this Court: whether a prisoner can challenge the validity of an already expired sentence merely because he has committed more crimes, the sentences for which are affected by the earlier

1. Statistics: *Table 2.9; U.S. District Courts - Prisoner Petitions filed by Nature of Suit*, compiled by the Administrative Office of United States Courts and covering the fiscal year periods from 1988 through 1999 disclose that Habeas Corpus petitions in Private Cases (U.S. Cases are separately reported) rose from 18,588 habeas cases in a 44,778 annual total in 1998 to 20,251 habeas cases in a 45,744 annual total in 1999. A note addressing the *overall* statistics reports: "As a result of the Prisoner Litigation Reform Act and Title I of the Antiterrorism Act, both of which passed in April 1996, filings decreased in 1997 and 1998."

The actual numbers of reported annual *habeas* filings as well as the ratio of such filings to total annual filings by state prisoners defy the trend of decrease expressed in the quoted note. In the earliest reported year, 1988, rounding the totals, the ratio of habeas/total state prisoner filings was a mere 29.6% [10,300/34,500]. By 1997 the ratio had grown to 41.1% [19,700/48,000]. In 1998 the ratio was 41.6% [18,600/44,800] and in 1999 it had grown to 44.6% [20,300/45,700]. The "custody" question is always a threshold issue in these cases.

conviction. The Third Circuit and several other courts have endorsed such after-the-fact litigation. To reach that result, the court below disregarded the import of recent precedent from this court, intensified a circuit conflict, and undermined efforts to limit habeas attacks on stale convictions.

Although this Court has not specifically resolved the question involved here, it has developed the reasoning that is dispositive of the issue. In *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), a defendant facing sentencing under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), sought to challenge the validity of state sentences that would be used to enhance the ACCA sentence. This court held that the use of the prior sentences in determining the later sentence did not create an automatic right of collateral attack. Instead, the Court concluded that the underlying sentences could be reopened only if the statute under which the defendant was being sentenced expressly authorized such attacks or if the state convictions were obtained through an *absence* of counsel (which the *Custis* court pointed out should be distinguished from ineffective assistance[2] of counsel) in

2. Under the *Custis* approach, the Court pointed out that there is no constitutional or explicit statutory right to review of expired state sentences merely because they became a partial basis for a future sentence imposed for a different crime:

> Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. We decline to do so.
>
> * * *

(Cont'd)

violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

The *Custis* court based this conclusion on explicit analogy to the "principles of finality associated with habeas corpus actions." 511 U.S. 497, 114 S. Ct. at 1739. The Court relied also on the administrative difficulty of requiring judges to "rummage through frequently nonexistent or difficult to obtain state court records that may date from another era," *id.* at 1739-39, in cases that are being resurrected years later merely because the prisoner committed a new offense, placing his criminal history again in issue.

The *Custis* rationale is logically applicable to the question raised in this and a multitude of other habeas cases. The inquiry of whether the logic of *Custis* should be regarded as the law for such cases is essentially an examination into the proposition of whether or not *Custis* ought to be regarded as having answered the question left open by *Maleng*.

The case of this prisoner's 1986 conviction for simple assault is as final as it can be. Not only is all appeal concluded, but the sentence has been completely served[3].

(Cont'd)

> Custis attacks his previous convictions claiming the denia. of effective assistance of counsel. . . . None of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from failure to appoint counsel at all.

Custis v. United States, *supra*, 511 U.S. 485, 496, 114 S. Ct. 1732, 1738.

3. This circumstance presents a case even stronger than that of Custis, who was still on state probation under the enhancing sentence (Cont'd)

The prisoner desires to revisit it now only because he chose to continue his criminal conduct, and his past has caught up with him.

Petitioner urged the Third Circuit, in the brief filed in that court, to be guided by the rationale of *Custis* in reaching its decision, but the Third Circuit ignored *Custis* entirely. Instead the Third Circuit (Appendix A at 12a) hinged this crucial aspect of its decision on its own "collateral consequences" rule developed for the Third Circuit in *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence."). The Third Circuit Court also (again Appendix A at 12a) viewed its decision as being buttressed by *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). Two separate problems inhere in efforts to buttress *Young v. Vaughn* with *Tucker*.

In the first place, in *United States v. Tucker*, comity was not a consideration. Comity is an important consideration here. The *Tucker* court was faced with a situation where the Ninth Circuit court, in an appropriate exercise of its supervisory powers over a subordinate federal court of the Ninth Circuit had simply ordered the district court to sentence a federal prisoner on a federal conviction without reference to an invalid state court conviction. The reasoning employed

(Cont'd)

when he was sentenced for his federal crimes. *See* 1994 WL 663719 at *9. The fact that habeas review was still available for the defendant in *Custis* does not mean that it is available for prisoners who wish to resurrect attacks on already expired cases.

by Judge Aldisert in an earlier opinion which he filed in this case is instructive to the point:

> The teachings of Tucker do not constitute an appropriate analogue to this case or any other federal habeas case brought under § 2254. United States v. Tucker by caption and by content was not a habeas case brought under § 2254 based on a state conviction; the defendant there was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. *This is a distinction with a fundamental difference.* (Italics supplied).
>
> * * *
>
> . . . In bringing his action, Tucker was attacking a federal sentence . . . that had been enhanced on the basis of invalid state court convictions. . . . Because the Court had no state officers as petitioners or respondents before it, the court lacked power or authority to give the option to a state court . . . to retry the defendant.
>
> * * *
>
> . . . [T]he Court had no alternative other than to order that the defendant be resentenced on the federal conviction without reference to the invalid state court convictions. (Appendix B at 87a).

The quoted reasoning reinforces the conclusion that in *Tucker* the Ninth Circuit Court, as was its entitlement — perhaps its obligation — was simply exercising its "supervisory power" over the conduct of a federal district

court in its jurisdiction. *See United States v. Hastings*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (In the exercise of its supervisory powers, federal court may, within limits, formulate procedural rules not specifically required by the Constitution or Congress; the purposes underlying use of supervisory powers are to implement a remedy for violation of recognized rights, to preserve judicial integrity by assuring that a conviction rests on appropriate considerations validly before the jury, and to deter illegal conduct.).

Although it seems evident, it merits restatement here that even though *Tucker* did not involve the comity concepts which this case does, the Third Circuit court's reliance upon *Tucker* had little to do with comity; it had to do with buttressing the Third Circuit's "collateral consequences" concepts as expressed in *Young v. Vaughn*, *supra*.

The second reason, additional to concepts of comity, why *Tucker* ought not be given effect here is that the *Tucker* case was brought by a federal prisoner under the provisions of 28 U.S.C. § 2255. Here the habeas petition was brought by a state prisoner under the provisions of 28 U.S.C. § 2254.

On page 10 of the opinion for which review is sought the Third Circuit interprets *Tucker* as implicitly applicable to habeas cases brought under § 2254 based on a state conviction. In so doing, the Third Circuit ignores the distinguishing factor that the defendant in *Tucker* was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. In such process the Third Circuit seems to have ignored that which Judge Aldisert had but recently declared was "a distinction with a fundamental difference." It appears that a similar distinction was found

to be of no consequence in *Maleng v. Cook*, but in *Maleng* this Court justified the result through the observation (490 U.S. at 493) that the State of Washington had placed a detainer with the federal authorities to ensure that at the conclusion of Maleng's federal sentence he would be returned to the state authorities to begin serving his 1978 state sentences.

Viewed in the context thus established, *Tucker* cannot fairly be regarded (*Maleng v. Cook*, notwithstanding) as constituting a holding by this Court that ". . . a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional [state court] conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence." (Appendix A at 12a).

As a consequence of the foregoing analysis, it can be seen that the vitality of the Third Circuit "collateral consequences" rule, as promulgated in *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence) is not supported by *Tucker* if the expired conviction is a state court conviction. Moreover, it has been shown that the "collateral consequences" rule, which *Young v. Vaughn* announced is plainly at variance with the rationale expressed in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

Nevertheless, the Third Circuit Court ignored *Custis*, relying instead upon *Tucker* in an evident effort to suggest that the question left open by *Maleng v. Cook* was correctly

answered by the Third Circuit's 1996 decision in *Young v. Vaughn*. However, in 1994 the Court of Appeals for the Eighth Circuit answered the question left open by *Maleng v. Cook* in a manner exactly contrary to the result reached in the present case which, as noted, is based almost solely[4] upon

4. There is to be found in the Eighth Circuit court's opinion of *Partee v. Hopkins*, 30 F.2d 1011 (8th Cir. 1994), a factual/procedural detail remarkably similar to one dwelt upon by the Third Circuit opinion in this case; a detail which illustrates the imaginative lengths to which courts find themselves obliged to go if they choose to answer the "custody" question left open by *Maleng* through a line of reasoning at variance with the reasoning that controlled the decision in *Custis*.

> In *Partee v. Hopkins*, the court expressed "substantial doubt that Partee's claim is procedurally defaulted, as the district court assumed. . . .." but added that:
>
> we need not remand for further exploration of this issue. . . . [of procedural default because in]. . . . *Custis v. United States* (citation omitted), the Supreme Court held that there is no federal constitutional right to collaterally attack a prior conviction used to enhance a sentence on any constitutional ground other than failure to appoint counsel for an indigent defendant. *Custis* establishes that Nebraska's decision not to allow collateral *Boykin* attacks as a matter of State law does not entitle Partee to federal habeas corpus relief.

Partee v. Hopkins, supra, 30 F.3d at 1012.

At footnote 8 of the opinion in this case, the Third Circuit court raised, and then sought to skirt, the question of procedural bar. Such endeavor made necessary by the fact that, as the accompanying text of the opinion discloses, Coss had not "presented to the Pennsylvania state courts his claim that the invalid 1986 conviction was used to

(Cont'd)

the Third Circuit's 1996 decision of *Young v. Vaughn*. *See Partee v. Hopkins*, 30 F.2d 1011(8th Cir. 1994) where the court, in express reliance upon *Custis v. United States*, *supra*, denied a state prisoner's claim to federal habeas relief from a state court sentence enhanced because of a fully expired state court sentence which, arguably, may have been constitutionally infirm. In so doing the Eight Circuit Court ruled that "there is no federal constitutional right to

(Cont'd)
enhance the subsequent conviction, the conviction being challenged by the underlying habeas petition." The latter part of this quoted statement is something of an anomaly because although, in his habeas petition, Coss complains of his 1990 *sentence* (for which he *is* in present custody) the underlying *conviction* giving rise to such complaint is the 1986 conviction for which he is not in custody. The reason why Coss omitted to present in state court any claim that his 1986 conviction was used to enhance his subsequent conviction in 1990 was best stated in the earlier dissenting opinion of Judge Aldisert:

> The precise issue that occupies our attention was not raised by the parties, but was rather injected by the majority without briefing or argument. Indeed Coss did not even request the relief he is now receiving. In his Second Amended Habeas Corpus Petition, drafted by counsel, Coss simply sought a new trial of his 1986 conviction.

It therefore can be seen that the Third Circuit Court's discussion of procedural bar and that court's efforts to explain *Commonwealth v. Ahlborn*, 548 Pa. 544, 699 A.2d 718 (1997) was (as with the district court's supposition of procedural bar in *Partee*) an endeavor necessitated principally by the failure of the respective courts to recognize, as did the Eighth Circuit court in *Partee*, that procedural bar has little if anything to do with the answer to the "custody" question. The question of custody, although expressly left open by *Maleng*, was implicitly answered by *Custis*.

collaterally attack a prior conviction used to enhance a sentence on any constitutional ground other than failure to appoint counsel for an indigent defendant."

Because in *Partee v. Hopkins*, both the expired sentence and the enhancement of the subsequent sentence were exclusively state court matters, with no federal sentencing or custody features interposed, the rule which the Eighth Circuit extrapolated from *Custis* seems particularly apropos here.

Federal circuits other than the eighth have reached a result similar to that announced in *Partee v. Hopkins*, *supra*. *See Pleasant v. State of Texas*, 134 F.3d 1256 (5th Cir. 1998) (Petitioner whose federal sentence was enhanced as result of his prior state robbery conviction was not "in custody" with regard to the robbery conviction, as required to exercise federal habeas jurisdiction over his petition challenging that conviction, where, although petitioner was in federal custody in part because of enhancement of his federal sentence, he had served his state sentence; petitioner could only challenge his state conviction in postconviction petition to correct his federal sentence.)

The clearly present conflict among the several circuits will surely become more pronounced with each passing year. It seems time that the question left open by *Maleng v. Cook* should be expressly addressed and expressly resolved.

II. AS A RESULT OF THE CONFLICT AMONG THE CIRCUITS ARISING FROM THE QUESTION LEFT OPEN BY *MELANG v. COOK* THE ENTITLEMENT OF A STATE PRISONER TO SECURE FEDERAL HABEAS RELIEF NOW HINGES MAINLY UPON THE CIRCUIT IN WHICH THE PRISONER'S HABEAS CORPUS PETITION IS FILED.

The decisions cited in the foregoing section of this petition make plain that if, for example, the § 2254 habeas petition filed in the Third Circuit by Edward Coss had been filed in the 8th Circuit he would have been summarily denied any relief for the reasons expressed in *Partee v. Hopkins*, 30 F.2d 1011 (8th Cir. 1994). Correlatively, if the § 2254 habeas petition filed in the 8th Circuit by Roosevelt Partee had been filed in the Third Circuit then, the Third Circuit court, applying the rationale of *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) would have found that Mr. Partee was "in custody" (even though the Eighth Circuit, upon the rationale of *Custis*, found to the contrary) and Mr. Partee would have been allowed to proceed.

Such a disparity of results, dependent upon the circuit in which a prisoner's habeas corpus petition is filed, and the manner in which the particular circuit defines "custody" of a prisoner ideally ought not be tolerated at all; assuredly the disparity ought not be permitted to flourish overly-long. As Chief Justice Marshall first noted, unlike the common law, where the court's power to issue a habeas writ was an inherent one, in the American system, judicial authority to grant the writ flows solely from the statutory grant. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 2 L. Ed. 554 (1807). The statutory grant of power in habeas cases filed by prisoners is contained in 28 U.S.C. § 2241(c)(3) which expressly obliges:

> The writ of habeas corpus shall not extend to a prisoner unless —
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Because the meaning of "custody" as the term is used in 28 U.S.C. § 2241(c)(3) is the threshold question central to each of the ever-increasing number of prisoner-petitions filed each year, it seems clear that in those federal circuits which have formulated an incorrect answer to the question left open by *Maleng v. Cook*, prisoners in those circuits are either:

> (a) regularly and repeatedly being denied habeas relief to which they have less-than-clear statutory entitlement,

or (as the case may be)

> (b) regularly and repeatedly being granted habeas relief which the congress has declared they should not be granted unless they are "in custody" under the judgment they seek to attack.

Moreover, 28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States.

Because 28 U.S.C. § 2254(a), provides the *exclusive* jurisdictional basis upon which, in criminal habeas matters, a federal judge is permitted to act, it seems clear that in those federal circuits which have formulated an incorrect answer to the question left open by *Maleng v. Cook*, judges in those circuits are regularly and repeatedly taking action on habeas petitions in the absence of any real jurisdiction to do so.

Whether the question of what constitutes "custody" is viewed in the context of 28 U.S.C. § 2241(c)(3) or in the context of 28 U.S.C. § 2254(a), the question left open by *Maleng v. Cook*, presently, and more strongly than ever, cries to be given a definitive answer; the matter of whether a prisoner is or is not in the "custody" which the statutes require ought no longer depend upon whether the federal circuit in which the prisoner's habeas petition is filed does or does not recognize *Custis* as having definitively, albeit implicitly, answered the question left open by *Maleng*.

III. RECENT CONGRESSIONAL ENACTMENTS WHICH PURPORT TO PLACE A STRICT ONE-YEAR TIME LIMITATION UPON APPLICANTS FOR FEDERAL HABEAS RELIEF TEND STRONGLY TO WARRANT A DEFINITIVE EXPRESSION FROM THE COURT AS TO WHETHER SUCH CONGRESSIONAL EXPRESSION SHOULD BE REGARDED AS INVEIGHING TOWARDS THE ANSWER TO THE QUESTION LEFT OPEN BY *MELANG v. COOK*.

The pertinent statutes, 28 U.S.C. §§ 2241 and 2254, do not expressly authorize collateral attacks on expired state sentences used in later sentencings. Instead the statutes provide for an action by a person "in custody in violation of the Constitution or laws or treaties of the United States."

Obviously, Congress intended the "custody" requirement to have its plain meaning, thereby restricting the class of cases to which habeas jurisdiction would extend; otherwise it would have provided for an action by a person claiming he *was convicted* in violation of the Constitution. If the "custody" requirement instead allows challenges to sentences on which a prisoner is *not* in custody, but which were simply used in a subsequent sentencing proceeding, then the plain meaning of the words used by Congress is being ignored and the statutory language has virtually no effect.

Recent changes[5] in the federal habeas statute emphasize the point. After long concern about stale attacks on state

5. 28 U.S.C. § 2244(d)(1) as amended Apr. 24, 1996, Pub. L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220 now provides: (Cont'd)

convictions, Congress has now acted to require a prisoner to seek federal habeas review within one year after his conviction becomes final. The decision of the Third Circuit here, as well as the decisions of other circuits which do not regard *Custis* as having answered the question left open by *Maleng*, tend to create an enormous loophole in the amended statute by allowing review of expired sentences so long as the prisoner alleges a connection between present incarceration on a new offense and the prior conviction. Whatever benefits Congress hoped would flow from the 1996 amendment requiring expeditious review of state criminal proceedings will be largely illusory.

Despite the clear statutory scheme and the teaching of this Court's recent precedent the conflict between the circuits as illustrated earlier in this Petition (in connection with the direct and obvious conflict between the decision here and *Partee v. Hopkins*, *supra*) persists[6] and widens. It must be

(Cont'd)
"A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

6. Like the Third Circuit in the present case, the Ninth Circuit does not read *Custis* as removing constitutional challenges to expired convictions from the purview of federal habeas courts in the context of a challenge to present custody. *Brock v. Westin*, 31 F.3d 887, 890 (9th Cir. 1994). *But c.f.*, *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995) (holding in proceeding under 28 U.S.C. § 2255 that, following *Custis*, there is no Constitutional right to collaterally challenge constitutionality of a prior conviction used to enhance sentence under ACCA for any reason other than *Gideon* violation).

The Eighth Circuit, in contrast, has held that *Custis* bars derivative habeas challenges despite the effect of a prior conviction

(Cont'd)

noted that some indefiniteness apparent in this Court's per curiam opinion in *Maleng v. Cook* may have contributed to the widening of the inter-circuit conflict of views:

(Cont'd)
on current custody, except where the claimed violation is deprivation of counsel. *Partee v. Hopkins*, 30 F.3d 1011, 1012 (8th Cir. 1994).

The Fifth Circuit had not directly addressed the issue prior to its 1998 decision of *Pleasant v. State of Texas*, 134 F.3d 1256 (5th Cir. 1998) which while not citing *Custis* appears to have been based upon reasoning similar to that employed by *Custis*. Previous to *Pleasant v. State of Texas* the Fifth Circuit had reiterated its pre-*Custis* view that derivative challenges may be maintained in habeas actions where jurisdiction is established by current custody. *Herbst v. Scott*, 42 F.3d 902 (5th Cir.), *cert. denied*, 115 S. Ct. 2590 (1995).

The Eleventh Circuit, without alluding to *Custis*, has continued to allow derivative collateral challenges in § 2254 actions. *White v. Butterworth*, 70 F.3d 573 (11th Cir. 1995).

The Seventh Circuit has taken a unique approach, holding that a prisoner claiming that a prior invalid conviction was used to enhance the sentence he is currently serving must be provided with an opportunity for a "fact-intensive" review on the merits of the prior conviction. If the prisoner has been provided with a full and fair opportunity to receive such review in state court, the federal court will not hear the challenge. If he has not been provided with such an opportunity, the federal court will entertain the claim in a habeas challenge to the current conviction. *Treadway v. Farley*, 35 F.2d 288 (7th Cir. 1994).

The First, Second, Fourth, Sixth, and Tenth Circuits do not appear to have revisited the question of derivative challenges in habeas actions since *Custis*. However, as previously noted, the First and Sixth Circuits have disallowed federal sentencing challenges to prior convictions, even where the defendant is not "in custody" for purposes of the prior convictions and has no other means to challenge them.

Maleng held that a state prisoner does not remain "in custody" under a conviction after the sentence imposed for it has fully expired merely because of the possibility [or even the actuality[7]] that the prior sentence will be used to enhance the sentence imposed for any subsequent crimes of which he is convicted. Yet the opinion then states that it "express[es] no view" on the extent to which an expired conviction could be challenged in the context of an attack on a current sentence.

What remains indefinite is how the Court's holding in *Maleng* is distinct from the point on which it purports to express no view. The only apparent reason for the prisoner in *Maleng* to have challenged an expired sentence was to escape a current sentence that was based on the expired sentence. If *Maleng* did not preclude such a challenge, it is unclear what it did do. *Custis* and the habeas statute itself (particularly through the congressional expression inherent in the amendment imposing a one year limitation) help to answer the question, but the circuits are still without sufficient guidance.

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7. The Court observed that

> [s]ince almost all states have habitual offender statutes, and many states provide . . . for specific enhancement of subsequent sentences on the basis of prior convictions, a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas.

490 U.S. at 492. The viability of the Court's observation as just quoted in light of the one year time limitation imposed by the 1996 amendment to 28 U.S.C. § 2244(d)(1) may deserve the Court's consideration.

To clarify the meaning of its precedent, to resolve inconsistency among the circuits, and to effectuate the controlling statute, this court should grant review.

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED FEBRUARY 29, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7416

EDWARD R. COSS, JR.,

Appellant

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 94-cv-01481)
District Judge: Honorable Thomas I. Vanaskie

Argued March 1, 1999

Before: STAPLETON, RENDELL and ALDISERT,
Circuit Judges

Re-Argued: November 8, 1999

Before: BECKER, *Chief Judge*, SLOVITER, MANSMANN,
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH,

Appendix A

McKEE, RENDELL, BARRY, ALDISERT and STAPLETON, *Circuit Judges.*

(Filed: February 29, 2000)

* * *

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Edward Coss appeals from the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He is not challenging the merits of the state conviction for which he is presently incarcerated. Instead, he contends that because a former conviction for which he is no longer incarcerated or under any parole restraint was tainted by a constitutional infirmity, and that conviction was improperly considered when he was sentenced for his second offense, his current term of incarceration violates his constitutional rights.

We must first decide whether the conviction of his first offense was considered by the sentencing judge in the matter for which he is presently incarcerated, thereby vesting subject matter jurisdiction in the District Court for his present petition. If we find such jurisdiction we must then examine his first conviction to determine whether he was denied his Sixth Amendment right to competent counsel. If we agree with this contention then we must decide what remedy is available to him.

Appendix A

I.

The melancholy chronicle of events started with a simple assault and battery that took place on June 25, 1986, in the small community of Dickson City in Lackawanna County, Pennsylvania, when the local police were called to a high school graduation party at the home of Carol Ann Frank, the sister of the then seventeen-year-old Appellant, Edward Coss. At the District Court hearing, testimony was presented that Appellant attended the party along with his brothers, Jimmy and Bobby, Appellant's girlfriend, Sherry Kulick, Carol Ann's roommate, Lisa Frieto, and Lisa's brother, George Frieto. Most of the guests at the party consumed alcohol.[1] It seems that Carol Ann's roommate, Lisa Frieto, got into a hair pulling contest with Sherry Kulick, and thereafter the revelers, all of whom had been drinking, apparently picked sides and a grand donnybrook was had by all until Carol Ann, the hostess, threw everyone out of her house.

Undeterred by the great outdoors, the donnybrookers continued their carousing outside until the landlord and the neighbors called the police. When the cops arrived with their usual greeting, "Break it up," there apparently was a slight problem in attitude adjustment, and the cops say that Appellant threw a couple of punches at one of them, landing himself in the local lockup. Totally dissatisfied with the accommodations, Appellant proceeded to voice his complaint by destroying a radiator, a sink, a toilet and a light fixture on the ceiling in his cell. For this, he was convicted of simple

1. Although at his trial Appellant's story differed from the facts we recount here, the District Court clearly credited this version of events.

assault and institutional vandalism and sentenced to six months to a year on each offense. Appellant did his time and was released to society on parole.

Appellant met with his assigned attorney, Rose Ann McGowan, on two occasions before his trial. The District Court made the finding of fact that Appellant gave McGowan the names and addresses of several potential witnesses during their first meeting.[2] Counsel gave Appellant no notice of the trial date but contacted him approximately one hour before the trial was to begin, at which point Appellant drove directly to the courthouse, stopping only to pick up his brother Jimmy at school.

---

2. Appellant testified at the evidentiary hearing that in the first meeting, he and McGowan discussed "the whole entire story, how it happened, [and] who was involved." His second and final meeting with McGowan prior to his trial occurred after a severance motion, requesting that the charges in connection with the simple assault be severed from those filed for the damage to the juvenile detention center, was filed in September 1986. He alleges that he and McGowan also discussed the names of possible witnesses at this meeting. McGowan did not testify what occurred at these meetings. She did testify at the evidentiary hearing that Appellant did not give her the names of any witnesses he wanted her to subpoena, but then admitted that she did not specifically remember Appellant's case and was instead testifying based on her general practice as a public defender.

The court also noted that even if Appellant did not provide the names to McGowan at this time, a cursory review of the police reports would have identified the names and addresses of some of these witnesses.

Appellant's trial began on October 30, 1986 and lasted two days. At the trial, the officers who arrested Appellant, Officers Adamitis and Wrobel, testified that when they arrived at the scene, individuals began scattering and that they grabbed Appellant as he was running to his car. They testified that Appellant was screaming vulgarities and smelled of alcohol. They testified that, after being grabbed, Appellant began pushing Officer Wrobel and was then arrested. They also testified that as Officer Adamitis attempted to grab Appellant's brother Bobby, Appellant punched Officer Adamitis in the face. This punch is the basis for Appellant's simple assault conviction. Finally, Officer Wrobel testified that an individual named George also hindered their attempts to arrest Bobby.

The only witnesses to testify on Appellant's behalf were Appellant and Jimmy.[3] Their accounts of the incident on June 25, 1986 were completely different from the testimony adduced some years later at the District Court hearing. They denied (1) that there was a party at Carol Ann's house that night and (2) that Appellant had been drinking. They testified (3) that on the night in question, Jimmy and Appellant were in their sister's driveway, along with their brother Bobby, and had been there no more than fifteen minutes when two police officers arrived and began to assault Bobby and Appellant, (4) that Appellant did not curse or punch anyone and (5) that he did not know who the officer was referring to when he stated that an individual named George was at the

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3. McGowan did not suggest that Jimmy testify. Instead, Appellant, on his own initiative, brought Jimmy to the trial and asked him to testify. McGowan admitted that she did not subpoena, interview or prepare Jimmy.

scene. Jimmy corroborated this story, stating that there was no party at Carol Ann's, that they were only at Carol Ann's house to give her a camera, that he had not been drinking and that Appellant did not hit a police officer.

The charges ultimately presented to the jury were institutional vandalism and criminal mischief, simple assault, resisting arrest and disorderly conduct. The jury convicted Appellant of institutional vandalism, criminal mischief and simple assault.[4] Appellant was sentenced on January 30, 1987, receiving six months to one year on the simple assault charge and six months to one year on the institutional vandalism and criminal mischief charges. The simple assault sentence ran consecutively to the institutional vandalism and criminal mischief sentence. As stated previously, Appellant has already served his sentence for these convictions.

On August 30, 1989, seven or eight months after Appellant's discharge from Pennsylvania parole supervision, a certain Peter Petrovich was beaten "by a group of five or six men, including appellant."[5] Appellant was subsequently arrested and convicted on one count of aggravated assault and battery and one count of simple assault for his part in the group effort to register displeasure on Petrovich's person. Appellant was sentenced to a term of six to twelve years imprisonment on the aggravated assault conviction.

4. The institutional vandalism and criminal mischief result from Appellant's destruction of the detention cell and are not related to Appellant's interaction with the police outside of Carol Ann's house.

5. *See Commonwealth v. Coss*, 695 A.2d 831, 833 (Pa. Super. Ct. 1997).

Presently, he is serving a sentence based on charges from this 1990 conviction, unrelated to his 1986 convictions. Although he has served the term for the simple assault charge, Appellant urges that his claim is not moot because the assault charge was used to enhance his sentence from the 1990 conviction for which he is still incarcerated.

II.

On September 15, 1994, Appellant filed a pro se petition for writ of habeas corpus pursuant to § 2254. Appellant filed an original and amended petition on November 29, 1995, and a Second Petition for Writ of Habeas Corpus on November 7, 1996. In the petition Appellant claimed that he was denied his Sixth Amendment right to effective assistance of counsel during the proceedings leading up to his 1986 convictions based on, among other things, counsel's failure to subpoena any of the witnesses he requested.[6]

On April 20, 1998, an evidentiary hearing was held to address Appellant's ineffective assistance of counsel claims. At the hearing, each of the witnesses that Appellant stated he had identified to counsel, namely, Carol Ann, Bobby, Sherry, and George, testified that McGowan did not contact them regarding Edward's trial and that he did not strike any police officer. Bobby, Sherry, and George testified that there

6. Appellant also alleged that his counsel was ineffective for empaneling two jurors adverse to Appellant's interests, failing to have the institutional vandalism and criminal mischief charges dismissed and failing to file post-trial motions. The District Court dismissed these other bases of ineffective counsel and, *see infra* Section V, Appellant does not appeal their dismissal.

was a party and Edward was present, that someone had called the police and that the first thing that the police did upon arrival was approach Edward and place him in the back of one of the police cars. They testified that the police then chased after Bobby, at which point George jumped on the back of one of the officers to try to hinder his attempt to arrest Bobby. Thus, according to these witnesses' testimony, Appellant was in the police car the entire time the police attempted to arrest Bobby. According to the District Court, "McGowan's recollection of the case [at the evidentiary hearing] was somewhat sketchy."[7] She conceded during the

7. From a review of the evidentiary hearing transcript, we agree with the District Court's characterization of McGowan's memory of this case. At the evidentiary hearing, McGowan testified:

> Q. Ms. McGowan, is your testimony, today, based on actual recollection of this particular case, the Coss case, or are you testifying, based upon your general practice, as a Public Defender, when you were employed in the Public Defender's Office?
>
> A. It would — it would be in part, yes, and in part, no. Because certain portions that I've responded to, I have direct recollection. As I said, I have direct recollection — once I looked at the sentencing report, I had direct recollection, exactly, what had transpired. I mean, once Mr. Coss told Judge Cottone, according to the transcript, that he was thinking about an appeal, but they were telling him this, and then I just — I recalled. I do recall distinctly, exactly, that they — the they .. was advising him this way, and he would not listen to me, okay? When we wanted to file the Post-trial Motions

(Cont'd)

hearing that she did not investigate the events surrounding Coss' arrest, electing not to dispatch her investigator to interview any of the witnesses at issue, and defended her actions by stating that "Coss must have told her not to subpoena them." Dist. Ct. Op. at 16 (June 10, 1998).

Following the hearing, the District Court denied Appellant's ineffective assistance of counsel claims. The court held that, although McGowan's failure to subpoena these witnesses "fell below an objective standard of reasonableness," Appellant failed to prove that he was prejudiced by McGowan's failure because the verdict would

(Cont'd)

> on that, he did not want them. . . . That is direct recollection. Now, the other stuff may be general.
>
> . . . .
>
> Q. Ms. McGowan, what I'm asking you about is, do you, specifically, remember having this conversation with Eddie Coss about these witnesses or is your testimony that this is how you normally conduct yourself?
>
> A. No, no. No, no, no, it wouldn't be. I would have asked him what about these people, what about these, what about these? You know, what were they doing there or how are they related to this?

The questioning continued with McGowan answering the questions regarding her failure to subpoena the witnesses in the form of what she "would have" done or what Coss "must have" said, as distinguished from stating what she "did" or what Coss "said."

not have been different, given the inconsistency in the accounts of Appellant and his brother on the one hand, and the witnesses and the police on the other. Appellant appeals this decision of the District Court, arguing on appeal that the District Court erred in its application of the prejudice prong of the ineffective assistance of counsel test as stated in *Strickland v. Washington*, 466 U.S. 668 (1984).

III.

Our first inquiry is whether the sentencing court at the 1990 conviction took into consideration the 1986 conviction. The presentence report of the Lackawanna Adult Probation Office indicated that Appellant had been convicted on January 30, 1987 of Institutional Vandalism, Criminal Mischief and Simple Assault and was sentenced "[o]n the charge of Simple Assault 6 months to 1 years plus costs, consecutive to the Institutional Vandalism sentence." Pl.'s Ex. 5 at 5. On March 26, 1996, Appellant's counsel raised the question whether Appellant's 1986 convictions should count as one misdemeanor, rather than two. Pl.'s Ex. 2 at 5. A Mr. Mecca, ostensibly from the probation office, commented:

> To state that when the defendant committed a simple assault in Dickson City was at that time petitioned, charged, placed in juvenile detention, and the following day in Scranton, Pennsylvania, decided or was charged with institutional vandalism, destroying the cell he was in, to say that is one and the same act as a simple assault, which was followed by hours, if not a day of no

> criminal activity, to say that is one under the guidelines is an error, Judge."

Id. at 9.

At a continuation of the hearing the next day the judge ruled that he "will view these as being one transaction, one incident, one conviction, rather than two. Therefore, I will be viewing the defendant with a prior record score of two rather than three." Pl.'s Ex. 3 at 5. On April 28, 1993, the judge stated that in determining the sentence "we've taken into consideration your presentence investigation, the report . . . [and] your prior record . . . ." Pl.'s Ex. 1 at 6.

We are satisfied that the sentencing judge for the 1990 conviction took into consideration Appellant's simple assault conviction stemming from the events of June 25, 1986.

IV.

We must now decide whether the District Court had subject matter jurisdiction over this habeas petition. Section 2254 confers jurisdiction on United States District Courts to entertain petitions for habeas corpus relief only from persons who are "in custody" in violation of the Constitution or laws or treaties of the United States. The Supreme Court has interpreted § 2254 as mandating that the petitioner be "in custody" pursuant to the conviction or sentence he seeks to attack at the time his petition is filed. *See Carafas v. LaVallee*, 391 U.S. 234 (1968). A habeas petitioner does not remain "in custody" under a conviction "after the sentence imposed for it has fully expired, merely because of the

possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam). A petitioner does, however, satisfy the "in custody" requirement for federal habeas jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction. *Id.* at 493. Moreover, in *United States v. Tucker*, 404 U.S. 443 (1972), the Court held that a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence. *See also Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence").

Although Appellant has already served the sentence resulting from the allegedly unconstitutional 1986 convictions and is currently serving a sentence for an unrelated conviction that occurred in 1990, he contends that the sentence from his 1990 conviction was adversely affected by the 1986 simple assault conviction. We have concluded that the sentencing judge did, in fact, refer to Appellant's 1986 conviction for assaulting a police officer in sentencing him for his 1990 conviction. Appellant is thus attacking his prior conviction in an attempt to have his current sentence, which relied on his prior conviction, reevaluated. The District Court therefore appropriately construed Appellant's petition as challenging the 1990 conviction rather than his expired conviction, *see Young v. Vaughn*, 83 F.3d at 75, and properly

concluded that it had jurisdiction over his § 2254 petition. *Id.* We have appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

V.

Absent a valid excuse, a habeas petitioner must present all federal claims to the state courts. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of the state courts in protecting federally guaranteed rights." *Evans v. Court of Common Pleas, Delaware County, Pa.*, 959 F.2d 1227, 1230 (3d Cir. 1992) (citing *O'Halloran v. Ryan*, 835 F.2d 506, 509 (3d Cir. 1987)). Of course, "[i]nexcusable or inordinate delay by the state in processing claims for relief may render the state remedy effectively unavailable" and exhaustion will be excused. *Wojtczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986).

Prior to filing his § 2254 petition, Appellant had a petition challenging his 1986 conviction pending under Pennsylvania's Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat. § 9541, *et seq.* (amended 1988), for approximately seven years without any activity. Under these circumstances, the District Court excused the exhaustion requirement and we find no fault with that decision. Appellant has not, however, presented to the Pennsylvania state courts his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990, the conviction being challenged by the underlying habeas

petition. Nonetheless, we conclude that this is not a situation in which the District Court was faced with a mixed petition necessitating a dismissal under *Rose v. Lundy*. As was made clear by the Pennsylvania Supreme Court in *Commonwealth v. Ahlborn*, 548 Pa. 544, 699 A.2d 718 (1997), collateral relief is not available under either the Post Conviction Hearing Act or under the common law remedies of state habeas corpus or coram nobis for a petitioner who is not currently serving a sentence of imprisonment for the conviction he wishes to challenge, even if petitioner contends that collateral consequences stem from that conviction. Accordingly, insofar as state law clearly forecloses state court review of Appellant's "collateral consequence" claim, the District Court properly excused exhaustion and entertained the claim on its merit.[8] *See, e.g., Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986) (citing *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam)).

VI.

Because Appellant submitted filings to the District Court both before and after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we think it necessary to briefly discuss the law governing this action. We conclude that the amendments brought about by AEDPA do not apply to this case as Appellant's original petition and amendment were both filed prior to AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320 (1997); *McCandless v.*

8. We view *Commonwealth v. Ahlborn* not as erecting a "procedural bar," but as a statement that there is no available state remedy for the claim that the present sentence was incorrectly enhanced by an invalid prior conviction.

Vaughn, 172 F.3d 255 (3d Cir. 1999); *United States v. Skandier*, 125 F.3d 178 (3d Cir. 1997). Though Appellant did file a "Second Petition" in November of 1996, i.e., after the enactment of AEDPA, that petition did not add new claims, but merely waived, as was permitted by the District Court's order of October 23, 1996, those claims presented in his original petition that were determined by the District Court to be unexhausted. *See Rose*, 455 U.S. at 510 (petitioner may amend his petition to delete unexhausted claims); *McMahon v. Fulcomer*, 821 F.2d 934, 941 (3d Cir. 1987) (same). In fairness, we view Appellant's "Second Petition" filed after AEDPA as tantamount to a further amendment or clarification to his initial petition, filed at the direction of the District Court, which merely expressed Appellant's intention to proceed with his exhausted claims. Therefore, we consider all the claims raised as having been asserted in a petition filed prior to AEDPA's enactment date. *See also United States v. Duffus*, 174 F.3d 333, 336-337 (3d Cir. 1999) (discussing, *inter alia*, the "relation back" provision of Rule 15(c), Federal Rules of Civil Procedure and its application to clarifying amendments to habeas petitions). Accordingly, pre-AEDPA requirements govern. Appellant was obligated to obtain a certificate of probable cause in order to appeal from the District Court's judgment dismissing his habeas corpus petition.

The pre-AEDPA certificate of probable cause did not require specification of issues and placed the entire case before the court of appeals. *See Ramsey v. Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998); *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996); *see also United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 765-766 (3d Cir. 1978).

By contrast, the post-AEDPA certificate of appealability requires specification as to which issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2), i.e., those issues for which the applicant has made a substantial showing of the denial of a constitutional right. In the instant case, rather than granting Appellant a certificate of probable cause to appeal, the District Court granted Appellant a certificate of appealability limited to his claim that counsel rendered constitutionally ineffective assistance by failing to subpoena witnesses on the simple assault charge. Under pre-AEDPA law we determined that it is inappropriate for a District Court to prescribe the issues or issue which may be considered in support of or in opposition to a judgment and that Appellant is free to choose which claims to assert on appeal. *Hickey*, 571 F.2d at 766. Because Appellant, through his attorney, limited his request for a certificate on appeal to the one issue he believed to be of "arguable merit," that is, the ineffectiveness of counsel claim at issue, we see no reason to extend our review beyond the merits of that claim. Moreover, given our disposition of the appeal, we believe that an expanded review would make little difference.

VII.

We now reach the merits of Appellant's Sixth Amendment claim that he was denied effective assistance of counsel. Because his contention involves the legal component of an ineffective assistance of counsel claim, we exercise plenary review. *Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998).

To obtain relief based on an ineffective assistance of counsel claim, a petitioner must not only show that his

counsel's performance was objectively unreasonable, but also that it prejudiced his case. *Strickland v. Washington*, 466 U.S. at 692. The District Court determined that his counsel's failure to subpoena the witnesses at issue was objectively unreasonable, but denied relief because Appellant had failed to demonstrate prejudice.[9]

To prove prejudice under the second prong of the *Strickland* test, a defendant must "establish a reasonable probability — one sufficient to undermine our confidence in the outcome — that the jury's verdict would have been different if not for counsel's errors." *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989). The District Court reached its conclusion that Appellant had failed to demonstrate prejudice because the witnesses who testified at the evidentiary hearing painted a completely different picture of the incident leading to Appellant's arrest from that told by Appellant and his brother, Jimmy, at trial. The evidentiary hearing testimony made clear that on the night of the incident Appellant had been drinking at a party that had to be broken up by the police. This version of events is a far cry from Appellant's trial testimony of a calm, quiet visit by him and his brother sabotaged by two rogue police officers. Assuming that Appellant still would have testified and would have testified in the way that he did, the District Court reasoned

9. We are not asked to review the issue of the reasonableness of counsel's actions as justifiable or strategic decisions. Appellant's attorney claimed no tactical merit to her failures except to say that she must have done what Appellant wanted in not subpoenaing witnesses; nor does the Commonwealth contest the District Court's finding that her conduct "fell below objective standards of reasonableness."

that the failure to call these witnesses was not prejudicial to Appellant. It reasoned that their testimony, if offered, would only have suggested to the jury that Appellant was lying on the witness stand and that Appellant was drunk and excitable during the incident. Because this case turned on a credibility determination between Appellant and the officers, the District Court reasoned that Appellant could not have been prejudiced by counsel's failure to call witnesses who only would have contradicted Appellant's version of the facts, destroying his credibility with the jury.[10] The District Court thus concluded that the outcome of the trial would have been no different, that is, Appellant still would have been found guilty of assaulting the officer, absent counsel's failure to summon the other witnesses.

We disagree with the District Court. Although it is unlikely that a court can determine with certainty the result of the proceedings absent counsel's failure, we must examine the "breadth of the evidence" and determine whether the case would have come out the way that it did if the witnesses had been present. *United States v. Kauffman*, 109 F.3d 186, 191 (3d Cir. 1997). Having examined the evidence in this case, including the evidentiary hearing transcript, we conclude that a reasonable probability exists that had counsel subpoenaed

10. The District Court also considered that Carol Ann and Bobby's testimony would have been suspect since they are Coss' siblings, that Sherry's testimony would have been suspect since she was Coss' girlfriend, and that George Frieto's testimony, while seemingly beneficial to Appellant in that he testified that it was he who attacked the officer, is also not inconsistent with the officer's testimony that an individual named George, in addition to Appellant, tried to hinder Bobby's arrest.

the witnesses, Appellant would not have been found guilty of assaulting the officer.

As a result of counsel's failure to conduct an investigation into the events surrounding Appellant's arrest, only Appellant and his younger brother Jimmy testified in his defense. There can be little doubt that Appellant and Jimmy decided to try to conceal the fact that they had been drinking that evening because they were both underage. Regardless of Appellant's motivation to lie about the context of the incident provoking his arrest, however, both he and Jimmy testified that Appellant did not assault a police officer. At the evidentiary hearing held to investigate Appellant's ineffective counsel claims, Carol Ann, Bobby, Sherry and George all testified that there was a party at Carol Ann's house, that the people at the party were consuming alcohol, that a fight broke out, and that the police came to break it up. Most important, they all testified consistently that Appellant did not punch a police officer. Bobby, Sherry and George testified consistently that it was George who jumped on a police officer's back when the officer assaulted Bobby. Finally, they testified consistently that, at the time the officers arrested Bobby, which according to the officers is the time that Appellant punched the officer, Appellant was sitting in the police car with the door shut.[11] Thus, although the witnesses' rendition of what happened on the night in question conflicts in large part with Appellant's version at his trial, all accounts of the evening are consistent in their most significant respect — Appellant did not commit the assault alleged.

11. It is important to note that all witnesses at the evidentiary hearing were sequestered, thus bolstering the credibility of these witnesses' convincingly consistent versions of the critical events.

We believe that the District Court employed too narrow an approach in analyzing Appellant's claim of prejudice. When it reached the prejudice prong of the *Strickland* test, the District Court stated that " '[p]rejudice' to a defendant from the failure to call witnesses should be assessed *in the context of the other testimony presented by the defense witnesses*." Dist. Ct. Op. at 18 (June 10, 1998) (emphasis added). The District Court phrased as the critical question: would the result of the trial have been any different if, instead of only Appellant and Jimmy testifying, the other four witnesses had also testified in Coss' defense? In so framing this question, the court assumed not only that Appellant would still have testified on his own behalf, but also that he would have told the same tale that he did at trial.

Strickland teaches that a court consider "the totality of the evidence before the judge or jury" in determining prejudice. 466 U.S. at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695-696.

Here, counsel's error had a pervasive effect, altering the entire evidentiary picture at trial. The testimony of the witnesses not presented should not be considered as merely a hypothetical supplement to the evidence actually offered at trial, with the remainder of the trial presumed to unfold as it actually did. Considering the totality of the evidence, we believe that, had counsel subpoenaed the witnesses and heard from them their version of the events (including that, although the police were correct in their allegations, it was George, not Appellant, who assaulted the officer), she would

not have presented at trial all versions of the evening's events, including Coss' clearly fictional rendition. When we assume the reasonably probable outcome without counsel's ineffectiveness, we must also assume a scenario that envisions counsel's acting effectively.[12] The District Court should have realized and considered the different course that the trial would probably have taken had counsel acted in an objectively reasonable manner by subpoenaing and interviewing these witnesses, and then presenting a defense consistent with their testimony. Had counsel interviewed these witnesses, we believe that there is a reasonable probability that Appellant would not have testified at all, or that he would have testified consistently with the other witnesses, thus avoiding the contradictory testimony that troubled the District Court.

As the Court has emphasized, the prejudice inquiry also involves concepts of reliability and fairness. *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). We believe that counsel's failure to subpoena these witnesses was prejudicial. They would have testified as to Appellant's innocence to the simple assault charge. This strongly suggests that the outcome of the trial would not have been the same. In light

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12. As pointed out by Appellant, if counsel had put both Appellant and the witnesses at issue on the stand and presented an inconsistent theory of defense, that in itself could constitute ineffective assistance. *See Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994). Of course, counsel cannot rely on *Bland* to say that it was proper for her to not offer the witnesses' testimony in her attempt to present a consistent theory of defense, because she did not interview these witnesses to ascertain any inconsistencies.

of the quantity of exculpatory evidence that was available yet not presented to the jury, we believe counsel's conduct made the result of the trial fundamentally unfair and unreliable. Appellant has thus met his burden under *Strickland* to prove that he was prejudiced by his counsel's failure to subpoena the witnesses at issue.

We, therefore, conclude that the District Court erred in denying the petition for a writ of habeas corpus.

VIII.

Finally, we must address what relief is appropriate. It has been suggested that, inasmuch as Appellant has already served his sentence under the tainted proceeding, the only relief available is to direct the Commonwealth to re-sentence Appellant for the 1990 conviction without any reference to the previous assault and battery conviction.

The normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding. It cannot be controverted that had Appellant filed his habeas petition during the period he was incarcerated or on parole from the first conviction and we decided that he had been deprived of his Sixth Amendment right to counsel, we would have accorded Pennsylvania the option of releasing him or correcting the infirmity by means of a new trial or other proceeding. *See, e.g.*, *Henderson v. Frank*, 155 F.3d 159 (3d Cir. 1998); *Barry v. Brower*, 864 F.2d 294 (3d Cir. 1988).

Here, however, we cannot "free" Appellant because he has already, in the vernacular, "done the crime and done the time." We are thus faced with the very nice question: Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist? In *Henderson*, we explained that "federal habeas power is limited, first, to a determination of whether there has been an improper detention by virtue of the state court judgment; and second, if we find such an illegal detention, to ordering the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings." 155 F.3d at 168.

Appellant contends that where a previously infirm conviction has been used to enhance the sentence in a subsequent criminal case, the only remedy available to a federal court is to require the state to re-sentence under the second conviction and deny it the opportunity to correct the constitutional infirmity in the previous case. He relies on a series of cases which we now examine.

Appellant's primary reliance is on the teachings of *United States v. Tucker*, 404 U.S. 443 (1972). We do not deem this to be an appropriate analogue to this case or any other federal habeas case brought under § 2254. By caption and by content *United States v. Tucker* was not a habeas corpus case brought under § 2254 based on a *state* conviction. There the defendant was seeking post conviction relief from a *federal* conviction pursuant to 28 U.S.C. § 2255. This is a

distinction with a fundamental difference. The Court could not possibly condition relief on affording any state the opportunity to retry the defendant because no state officials were parties to the lawsuit. No state wardens, custodians or state officers were respondents or defendants as in the case of a § 2254 petition. In bringing his action, Tucker was attacking a federal sentence imposed by the District Court for the Northern District of California that had been enhanced on the basis of invalid state court convictions from Florida and Louisiana. Because the Court had no state officers as petitioners or respondents before it, the Court lacked power or authority to give the option to a state court in Florida or Louisiana to retry the defendant. To prevent the "erosion of the *Gideon* principle" that the right to effective assistance of counsel is fundamental, the Court had no alternative other than to order that the defendant be re-sentenced on the federal conviction without reference to the invalid state court convictions.[13] In contrast, in every habeas petition brought under § 2254, an officer of the state or a political subdivision thereof is *always* the respondent. The teachings of *Tucker*

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13. The Court's discussion is specifically targeted to a § 2255 case:

> [T]he real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but *whether the sentence in the 1953 federal case might have been different* if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.

404 U.S. at 448 (emphasis added).

reflect one exception to the general rule of permitting the state to correct the constitutional infirmity in a subsequent sentence enhancement case — where the federal court lacks the authority to afford the state the opportunity to correct the constitutional infirmity because no state officer is a party to the litigation. We now turn to other exceptions reflected in the cases.

This court has held that where a return to the state for additional proceedings "would be virtually impossible" under the circumstances, the federal court in a § 2254 case may simply order re-sentencing on the subsequent conviction without affording the state an opportunity to cure the previous constitutionally infirm conviction. *See Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989). *Clark* was a deprivation of due process case lodged against a prior conviction that served to enhance the sentence for a subsequent offense. The gravamen of the petitioner's complaint was that in 1974, when Clark was 17 years of age, he was denied a juvenile court hearing to determine whether he should have been tried as a juvenile or as an adult. We determined that this denial constituted a due process violation, reversed the district court and granted relief, and, without elaboration at this point in the opinion, ordered that "the matter must be remanded for re-sentencing on the 1979 conviction without consideration of the prior offenses." 892 F.2d at 1153. Nevertheless, earlier in our opinion, recognizing that at the time we heard this appeal in 1989, the petitioner was 31 years old, there is a statement of reasons supporting our determination of the proper relief. Although set forth in our discussion of a portion of the Pennsylvania Post-Conviction Hearing Act, we commented that "both the

delay, 16 years since the alleged due process violation, and the prejudice . . . are present. . . . Given the death of the trial judge and the destruction of the relevant stenographic notes, to now defend against this issue in a collateral proceeding would be virtually impossible. . . . To return to the Pennsylvania courts would thus be futile." 892 F.2d at 1148-1149. Moreover, before us and in the district court the Commonwealth gave no indication that it wished to pursue further proceedings in the constitutionally infirm 1974 prosecution. The only relief possible was to order a re-sentencing on the subsequent conviction without enhancement. Thus, *Clark* reflects a second exception to the general rule permitting the state to exercise the option of additional proceedings.

In addition, a defendant could not be retried by the state where the trial never should have been held because of a serious constitutional violation such as denial of a right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). *Barker* teaches that:

> [T]he [speedy trial] right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Id. (emphasis added). The Court also teaches that dismissal is the only remedy for violation of the double jeopardy

principle. In *Benton v. Maryland*, 395 U.S. 784, 795-796 (1969), the Court remarked:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. (quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957)).

An example of a double jeopardy problem would arise if a petitioner were successful in a case like *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson*, the petitioner claimed in a habeas corpus proceeding that he had been convicted on constitutionally inadequate evidence. The Court held that the petition would be granted if "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. Had the petition been granted in that case, the state could not retry the petitioner because it would violate his right against double jeopardy. *See also Burks v. United States*, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials.").

Another situation where a defendant cannot be retried is when a writ is granted because the state denied the petitioner due process of law by suppressing or destroying exculpatory evidence that no longer can be reconstructed. *See Brady v. Maryland*, 373 U.S. 83 (1963). If the prosecution were to not only withhold exculpatory evidence in violation of *Brady*, but also destroy it, a defendant could never receive a fair trial. The defendant could never produce the totality of the evidence in his or her defense because of the constitutional violations. In this instance, the only constitutional remedy would be unconditional granting of the writ.

There is no parallel between the case at bar and those cases where courts have determined that states should not be entitled to retry the petitioner.

* * * * *

Therefore, we will condition the entry of the writ by extending to the Commonwealth the option of conducting a new trial. If this new trial produces a verdict different from the prior verdict, the state must re-sentence Appellant to account for any enhancement due to this guilty verdict.[14] The

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14. Even if the Commonwealth elects to retry Coss, he will have to be re-sentenced regardless of the outcome. Even if a valid conviction is forthcoming on the earlier charge, nothing changes the fact that his current sentence was enhanced by an unconstitutional violation. A vacated conviction is not the same conviction as one that occurs after *vacatur*. Thus, in the event of a valid conviction, he would still have to be re-sentenced on the subsequent offense in light of new proceedings on the earlier offense.

(Cont'd)

Commonwealth also has the option of not affording a new trial and merely proceeding into re-sentencing on the 1990 conviction.

For the reasons stated above, we will reverse the judgment of the District Court that denied the petition for a writ of habeas corpus and remand with instructions that it issue a writ of habeas corpus conditioned on the foregoing options available to the Commonwealth.

(Cont'd)

We hold only that a retrial on the earlier offense would not violate the Federal Constitution and that comity requires us to afford the Commonwealth the opportunity to cure the original constitutional defect. We express no opinion on whether such a retrial would be consistent with Pennsylvania law. Moreover, if there is a conviction on retrial of the earlier offense, the Double Jeopardy Clause requires that the time he has already served on the original 1990 sentence be credited against the new sentence. *North Carolina v. Pearce*, 395 U.S. 711, 718-719 (1969) ("If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, these years can and must be returned — by subtracting them from whatever sentence is imposed."), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

Appendix A

NYGAARD, *Circuit Judge*, dissenting.

I agree with much of the majority's opinion. Indeed, I agree that Coss was denied effective assistance of counsel during his 1986 trial for simple assault, and that his subsequent conviction on that charge is constitutionally infirm as a result. I part company with the majority over the question of whether the challenged sentence "might have been different if the sentencing judge had known that at least [some] of the respondent's prior convictions had been unconstitutionally obtained." *United States v. Tucker*, 404 U.S. 443, 448 (1972). On this record, I have no doubt that the sentencing judge would have imposed exactly the same sentence had he known Coss' 1986 conviction for simple assault was constitutionally infirm. Therefore, I respectfully dissent from that portion of the majority's opinion holding that Coss is entitled to habeas relief. Because I conclude that no relief is due, I express no view on the propriety of the majority's remedy.

This is at least the third time that Coss has asked a court to review the sentence arising from his 1990 conviction for simple and aggravated assault. The first time, the Pennsylvania Superior Court "vacated the sentence because it was not clear that the presentence report was accurate" and remanded the case for resentencing. *See Commonwealth v. Coss*, 695 A.2d 831, 833 (Pa. Super. 1997) (mem) (citing *Commonwealth v. Coss*, 674 A.2d 313 (Pa. Super. 1996)).

At his resentencing hearing, Coss challenged both the gravity assigned to his aggravated assault conviction, and its enhancement based on his criminal record. *See id.* The

Appendix A

sentencing court agreed that his three misdemeanor convictions in 1986 all arose from the same action and, accordingly, reduced his prior record score from 3 to 2. *See id.* The effect of the adjustment was to eliminate the 1986 convictions from Coss' prior record score entirely. The post-adjustment score of 2 was based solely on Coss' 1985 adjudication of delinquency. *See id.* at 835. Despite making the adjustment, however, the court resentenced Coss to the same six-to-twelve-year sentence it had originally imposed. That sentence remained within the standard range provided by the state sentencing guidelines even after the prior record adjustment, and the court found no reason for a downward departure. *See id.* at 833-34.

In resentencing Coss to the same sentence it had originally imposed, the sentencing court considered a number of different factors. In explaining the sentence for the record, the court informed Coss that:

> in passing sentence on you I've taken into consideration the presentence investigation report, and I've deleted therefrom all the remarks through the matter brought to my attention by [defense counsel] and I will not consider those matters.
>
> I've taken into consideration the statements by [defense counsel] and the seriousness and nature of the crime involved here, the well being and protection of the people who live in our community, your prior criminal record, the possibility of your rehabilitation, and the testimony that I've heard. I was the trial judge,

> and I take into consideration the testimony from the trial.

Sentencing Transcript of 03/27/1996 at 4-5, *reproduced in* Supp. App. at 243-44.

I would not deny Coss the relief he seeks merely because his prior criminal record was only one of many factors on which the sentencing court based its decision. Instead, I would deny relief because his 1986 simple assault conviction is such a minor component of that record that there is no question that the sentencing court, given its concerns, would have imposed exactly the same sentence in any event.

Given the nature of Coss' appeal, it is certainly understandable that the focus of attention has been on the challenged 1986 conviction for simple assault. But I take a broader view and include the extensive criminal record that Coss has managed to compile. It starts with a 1980 arrest, when Coss was 11 years old, for recklessly endangering another person. *See* Presentence Investigation Report at 4, *reproduced in* Supp. App. at 258. Thereafter, Coss was adjudicated delinquent on five separate occasions (when he was 12, 13, 15 and 16 years old) for, respectively: (1) theft and receiving stolen property; (2) disorderly conduct and resisting arrest; (3) simple assault; (4) yet another simple assault; and (5) burglary. *See id.*

As an adult, Coss has been convicted on the aggravated and simple assault charges for which he is currently imprisoned. In separate incidents, he has pleaded guilty to disorderly conduct after being charged with that offense, as

well as with hindering apprehension, in 1989. He also pleaded guilty to possession of a controlled substance in 1992 after being charged with that offense, and with reckless endangerment in 1991.

In addition, Coss' record at the time of sentencing included:[1]

(1) a 1986 arrest for making terroristic threats;

(2) a 1988 arrest for aggravated assault and simple assault;

(3) a 1988 arrest for delivery of a controlled substance (heroin);

(4) a 1989 arrest for aggravated assault, simple assault, recklessly endangering another person and disorderly conduct;

(5) another 1989 arrest for aggravated and simple assault;

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1. Under Pennsylvania law, a sentencing court may consider prior arrests in an offender's record, that did not result in convictions, "so long as the court realizes that the defendant had not been convicted on those prior charges," and does not give them "undue weight." *See Commonwealth v. Craft*, 450 A.2d 1021, 1024 (Pa. Super. 1982) (citing *Commonwealth v. Straw*, 361 A.2d 427 (Pa. Super. 1976); *Commonwealth v. Tisdale*, 334 A.2d 722 (Pa. Super. 1975); *Commonwealth v. Shoemaker*, 313 A.2d 342 (Pa. Super. 1973), *aff'd* 341 A.2d 111 (1975)); *see also Commonwealth v. Allen*, 489 A.2d 906, 912 n.4 (Pa. Super. 1985).

(6) yet another 1989 arrest for simple assault as well as for making terroristic threats;

(7) a 1990 arrest for simple assault and retail theft; and

(8) a 1990 arrest for retail theft and criminal conspiracy;

See id. at 5-7.

The 1996 sentencing court was intimately familiar with Coss, with the charges on which he had been convicted, and with his criminal record. It had the opportunity to hear the evidence against Coss at trial. It had the opportunity to hear from Coss at sentencing. *See* Sentencing Transcript of 04/28/1993 at 4-5, *reproduced in* Supp. App. at 199-200. Most importantly, it had the relatively rare opportunity to reconsider its decision when the original sentence was vacated on appeal. Yet, the court chose to impose the same sentence it had initially imposed, finding "no reason" for a reduction. *See* Sentencing Transcript of 03/27/1996 at 26, *reproduced in* Supp. App. at 244.

In finding no reason to reduce Coss' sentence, the court found it "indicative from [Coss'] actions" that he would "continue to break the law." *Id.* Given the extensive and often violent nature of Coss' criminal record, I find it impossible to conclude that the sentencing court's concerns for "the well being of the people who live in our community" and the "possibility for [Coss'] rehabilitation" would have been allayed by the omission of his 1986 conviction for simple

assault from his criminal record. Because I am certain that the sentencing court would not have sentenced Coss differently had it known that one conviction was constitutionally infirm, I respectfully dissent from the majority's conclusion to the contrary.

Judge Roth joins in this dissenting opinion.

RENDELL, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the reasoning and result of the majority opinion in all respects except its discussion of the relief to be afforded to Eddie Coss as set forth at Part VIII. I believe that Part VIII of the majority opinion proceeds from an erroneous premise about a "general rule" to be followed in habeas cases challenging a sentence enhancement, *ante* at 19, 20, and then, as a result, asks the wrong question about what relief is appropriate in this particular case.[1] I conclude that: (1) a "general rule" favoring retrial does not exist in subsequent sentence enhancement cases; (2) for reasons of prudence and comity, the better alternative in this case is to condition our writ only on the Commonwealth court's *resentencing* Coss on his 1990 conviction; and (3) such a writ would not provide an untoward "windfall" to the petitioner.

The majority's discussion of remedy begins with the unobjectionable proposition that "[t]he normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding." *Ante* at 18. I take no issue with this statement, nor do I disagree with the majority's assertion that, in § 2254 cases, there is a "general rule of permitting the state to correct

1. This "nice" question, *see ante* at 18, is: "Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist?"

the constitutional infirmity," and that this rule extends to subsequent sentence enhancement cases as well as other habeas cases. *Ante* at 19.

However, the majority then makes an unarticulated leap of logic that I cannot accept, transforming its general rule that the state should be permitted to correct its constitutional error into a "general rule" that the state should be permitted *retrial* as the method for this correction whenever possible. This latter rule simply does not exist. It is true, as the majority observes, that in an *ordinary* habeas case — one in which the confinement that gives rise to the § 2254 petition stems directly from the conviction that is alleged to be deficient — the writ normally granted is a conditional writ allowing the state to retry the defendant. This is because, in garden-variety habeas cases, the "constitutional infirmity" being complained of lies in the conviction being challenged. In contrast, in a situation involving an improperly enhanced sentence, it is the latter sentence itself that is the basis for our jurisdiction and that is the "constitutional infirmity" complained of. *See Maleng v. Cook*, 490 U.S. 488, 490 (1989) (per curiam) (stating that a habeas petitioner in an enhancement case is not "in custody" on the earlier expired sentence, but rather is "in custody" only on the subsequent enhanced sentence); *Young v. Vaughn*, 83 F.3d 72, 75-76 (3d Cir. 1996) (stating that we have jurisdiction in a *Maleng*-type case only because the habeas petition is construed as challenging the subsequent enhanced sentence rather than the underlying conviction, and pointing out that "the purpose of [petitioner's] petition is presumably to terminate the sentence he is presently serving"). Accordingly, while I agree that we should "permit the state to correct the constitutional

infirmity," I believe that this goal is to be accomplished by conditioning our writ on the state's *resentencing* Coss in a manner consistent with the knowledge that his 1986 conviction was obtained without the effective assistance of counsel. Such a writ, which would instruct the state to release Coss unless it resentences him in a fashion that accords with our determination that the use of the 1986 conviction as a sentencing enhancer was improper and rendered his sentence unconstitutional, is an exact parallel to the conditional writ in an ordinary habeas case, which instructs the state to release the petitioner unless it repeats the offending process in a way that accords with the reviewing court's determination that some aspect of that process was constitutionally infirm.

The majority asserts that cases such as *Tucker*[2] and *Clark*[3] are exceptions to a general rule that the state should be permitted retrial whenever possible, even in the sentencing enhancement scenario. However, the majority has not been able to point to one enhancement case in which a habeas court has ordered retrial on the initial charge, or even suggested retrial as a potential form of relief. Nowhere in the case law is there support for the proposition that *Tucker* was conceived as an exception to a general rule of retrial applicable in sentence enhancement cases.[4] Although it is

2. *United States v. Tucker*, 404 U.S. 443 (1972).

3. *Clark v. Pennsylvania*, 892 F.2d 1142 (3d Cir. 1989).

4. Cases cited by the majority such as *Henderson v. Frank*, 155 F.3d 159, 162 (3d Cir. 1998), which ordered a writ conditioned on retrial, and *Barry v. Brower*, 864 F.2d 294, 296 (3d Cir. 1988), (Cont'd)

true that *Tucker*, unlike the instant case, addresses the use of earlier state convictions as invalid enhancements of a *federal* sentence, there is no evidence either in *Tucker* itself or in subsequent cases citing *Tucker* that *Tucker* is limited to cases arising from § 2255 petitions. The majority quotes an excerpt from *Tucker* as support for the theory that *Tucker* is so limited, *see ante* at 19 n.13. However, the majority has omitted the lines immediately preceding that excerpt, which clearly point in the opposite direction. The full content of the relevant passage is instructive:

> We need not speculate about whether the outcome of the respondent's 1938 and 1946 prosecutions would necessarily have been different if he had had the help of a lawyer. Such speculation is not only fruitless, but quite beside the point. For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.

(Cont'd)
which ordered a writ conditioned on re-appeal (the relief granted in *Barry* was re-appeal because the violation in question occurred in the appellate proceeding), simply do not present the same situation as the instant case; *Henderson* and *Barry* are not sentence enhancement cases and only involve the "garden-variety" habeas scenario. Similarly, the double jeopardy and other non-sentence enhancement cases cited by the majority do not resolve the question before us.

Tucker, 404 U.S. at 447-48. In other words, the relevant inquiry is *not* an inquiry into the prior convictions themselves; the Supreme Court's characterization of such speculation as being "quite beside the point" suggests that the convictions are not the appropriate targets of our relief. Rather, as *Tucker* states, the "real question" is whether the result of the *sentencing* proceeding is suspect. I cannot accept the majority's statement that *Tucker*'s import is somehow limited to § 2255 petitions. *Tucker* simply does not present itself as an exception to a general rule. Nor has our Court's jurisprudence understood *Tucker* as such.[5] Rather, *Tucker* appears to reflect a background assumption that resentencing — providing the sentencing court with the opportunity to correct the infirm sentence that was attacked in the habeas petition — is the appropriate remedy in habeas challenges to sentence enhancements.

Many federal appellate cases, including some of our own, support the basic concept that resentencing is the default form

5. Third Circuit case law clearly states that *Tucker* itself is applicable beyond the § 2255 context. In *Clark*, a § 2254 enhancement case, we made several references to the fact that *Tucker* was the governing precedent. *See Clark*, 892 F.2d at 1144 ("Thus, under the mandate of United States v. Tucker, the matter must be remanded for resentencing of the 1979 conviction with instruction that the 1974 convictions, obtained in violation of Clark's constitutional right to due process, not be considered in the imposition of the sentence.") (citation omitted); *id.* at 1149 n.10 ("The only relief permitted under Tucker is resentencing on the subsequent conviction."); *id.* at 1150 ("Because the 1974 convictions were relied upon by the 1980 sentencing court, Clark is entitled to the relief provided by Tucker and must be resentenced."). That is, we not only afforded resentencing as the relief in a § 2254 case, but also explicitly stated that *Tucker* controls § 2254 as well as § 2255 cases.

of relief in habeas challenges to invalid sentence enhancements. The law of our Court is actually quite clear on this point. In *Clark*, we held that where a Pennsylvania sentencing judge wrongly considered two previous Pennsylvania convictions obtained while Clark was a juvenile but without appropriate juvenile procedures, the appropriate relief on Clark's § 2254 petition challenging the enhanced sentence was resentencing on the later, wrongfully enhanced charge. *See Clark*, 892 F.2d at 1143-44. In its references to resentencing as the proper remedy, *Clark* is replete with language about "mandates" and "musts,"[6] and refers to resentencing as "[t]he only relief permitted under Tucker." *Id.* at 1149 n.10. The majority's efforts to explain *Clark* away on the basis that the sixteen years that had passed since the prior trial made retrial in *Clark* impracticable are unavailing; these arguments would be equally applicable to Coss's case, in which retrial would require reopening of a simple assault case whose events took place nearly fourteen years ago. Other Courts of Appeals have apparently assumed resentencing as the relief in sentence enhancement cases, and indeed the Seventh Circuit Court of Appeals has specifically read *Tucker*'s holding to extend to § 2254 cases. *See, e.g.*, *Crank v. Duckworth*, 905 F.2d 1090, 1090 (7th Cir. 1990) ("Tucker holds that 'misinformation of constitutional magnitude' — that is, reliance on an invalid prior conviction — authorizes relief from the current sentence.") (citation omitted);[7] *Feldman v. Perrill*, 902 F.2d 1445, 1449-50

6. See, for example, the three excerpts from *Clark* quoted in note 5 above.

7. *Crank*, like the instant case, is a § 2254 petition case in which both the prior, allegedly flawed conviction and the subsequent

(Cont'd)

(9th Cir. 1990) (stating that if the challenged prior conviction is indeed flawed, the appropriate remedy shall be a remand to the Parole Commission for a recomputation of the petitioner's parole eligibility on the later offense without consideration of the challenged conviction);[8] *see also Smith v. Farley*, 25 F.3d 1363, 1368 n.10 (7th Cir. 1994) (stating that a petitioner challenging a wrongly enhanced sentence would not be seeking to set aside his original conviction as constitutionally invalid, but would merely be challenging "the constitutionality of his conviction as used to enhance his present sentence"). In fact, Justice Souter has described the "uniform appellate case law" in this area as suggesting that the wrongly enhanced sentence, not the prior conviction, is the target of the habeas petition. *See Custis v. United States*, 511 U.S. 485 (1994) (Souter, J., dissenting) (joined by Blackmun and Stevens, JJ.) (pointing out that the *Custis* majority's holding "does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction"). At the very least, I think it clear that the appellate

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(Cont'd)
sentence that relied on that conviction as an enhancement were state offenses (both the initial and subsequent *Crank* convictions were Indiana state convictions).

8. Although *Feldman*, like *Tucker*, addresses the use of a flawed previous state conviction in a subsequent federal proceeding, nothing in *Feldman* suggests that reaching back to the original conviction would be appropriate in any sentence enhancement case. The Ninth Circuit Court of Appeals noted that *Feldman* was "indistinguishable from Maleng," a § 2254 case. *Feldman*, 902 F.2d at 1448.

case law dispels any notion of a "general rule" favoring retrial on the previous conviction in an enhancement case.

I think it equally clear that resentencing is the appropriate remedy in this case, for several reasons implicating both judicial prudence and comity. First, I am not convinced that we even *can* afford the relief suggested by the majority. Having served his entire sentence on the original 1986 conviction, Coss clearly is not "in custody" on that charge, *see Maleng*, 490 U.S. at 490, and therefore would not have recourse to the remedy of retrial through a habeas petition at this point. It is unclear to me that we have the power to provide that same relief, the benefits of which are unavailable to the *petitioner* in a habeas petition challenging a subsequent enhanced sentence, to the *respondent* in that same petition. I have found no federal case that addresses this question,[9] and I believe that we should not reach out to decide this issue unnecessarily when we can instead choose the well-established option of simply conditioning our writ on the Commonwealth's resentencing Coss on the 1990 conviction.

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9. A leading treatise on federal habeas procedure notes that *Maleng* left open this very question. *See* 1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 8.2c, at 333 n.20 (3d ed. 1998) ("*Maleng* . . . left open . . . [the] question whether, in the process of voiding a current sentence enhanced on the basis of an unconstitutionally imposed prior conviction as to which custody has terminated, the prior conviction 'itself' may be voided, thus depriving it of other collateral consequences in addition to its effect on the sentence currently being served.") (citing *Maleng*, 490 U.S. at 493-94).

In addition, I believe that the comity concerns raised by the majority argue in favor of relief limited to resentencing. It is difficult to determine what ramifications the relief mandated by the majority will have on the 1986 state conviction. I am not certain exactly what it means to give a state an "opportunity" to retry a defendant in this context; I cannot fit the majority's proposed relief into any proper procedural parlance. Are we vacating the underlying 1986 conviction? Are we overturning it? It seems that in order to allow the state to retry Coss, we must essentially declare the 1986 conviction, which is not the subject of the current petition, invalid for all purposes. This seems to me a far more extensive intrusion on the state's criminal process than the alternative of merely declaring that that conviction cannot be used to enhance the sentence at issue in Coss's habeas petition. Thus, the principle that federal habeas courts should generally grant the relief that "require[s] the least intervention into the state criminal process," *Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998), suggests that conditioning the writ on resentencing is the appropriate option here.[10] Several cases

10. Contrary to the majority's assertion, *Henderson*'s guidance that federal habeas power is seemingly limited "first, to a determination of whether there has been an improper detention by virtue of the state court judgment; and second, if we find such an illegal detention, to ordering the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings," *Henderson*, 155 F.3d at 168, argues in favor of conditioning the writ on resentencing on the 1990 charge rather than on the possibility of retrial on the 1986 charge. The "detention" complained of by Coss (indeed, the only detention he suffers) is the detention resulting from the 1990 sentence, and thus the relevant proceedings that the state should have the opportunity to correct are the sentencing proceedings, not the 1986 conviction.

decided by the Seventh Circuit Court of Appeals have explicitly found that comity concerns are implicated less by resentencing than by a reopening of the initial state conviction.[11] *See, e.g.*, *Crank*, 905 F.2d at 1091 ("We did not decide in Lowery whether the federal court could invalidate the prior conviction for all purposes or only for the purpose of the particular sentence then being served, an important distinction if the state rendering the original judgment retains an interest in its validity."); *Smith*, 25 F.3d at 1368 n.10 (finding that "merely . . . challeng[ing] the constitutionality of [the earlier] conviction as used to enhance his present sentence" implicates comity less directly than would "set[ting] aside the [earlier] conviction as constitutionally invalid"). Furthermore, as previously noted, Coss has served the full sentence imposed on him by the Commonwealth for the 1986 conviction, reducing any possible interest that the state might have in retrying him.[12]

11. As noted in the majority opinion, the majority's choice of relief would require resentencing on the 1990 charge regardless of the Commonwealth's decision whether to pursue a retrial on the 1986 charge, and regardless of the outcome of such a retrial should it occur. *See ante* at 22 n.14. Thus, the limited intrusion on state process that is presented by resentencing will occur regardless of which relief we choose to fashion — the relief ordered by the majority as well as the relief that I would propose.

12. *See Feldman v. Perrill*, 902 F.2d 1445, 1450 (9th Cir. 1990) (stating that, because the petitioner who challenges a later sentence enhancement is no longer in custody on the initial flawed conviction, the state rendering that initial conviction "has extracted its punishment and has no further interest in petitioner"). We need not go as far as *Feldman*'s statement that the state's interest in the initial conviction is *eliminated*. However, the fact that Coss has served his full sentence on the 1986 conviction clearly greatly reduces the Commonwealth's interest in that conviction.

The majority's contention that comity is fostered by its choice of relief is further weakened by the fact that the Commonwealth of Pennsylvania has already had the opportunity to address the validity of the 1986 conviction, and declined to do so. As Part V of the majority opinion discusses, *see ante* at 10, Coss presented the Commonwealth with an attack on his 1986 conviction in a petition pursuant to Pennsylvania's Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat. § 9541 *et seq.* (now known as the Post Conviction Relief Act). Prior to Coss's filing his § 2254 petition in federal court, the state PCHA petition had been pending for approximately seven years without any activity.

Pennsylvania's inaction also highlights one aspect of the inaccuracy of the "nice" question posed by the majority, *see ante* at 18: "Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist?" I submit that any "right" to cure the Sixth Amendment defect inherent in the 1986 conviction has already been afforded to the Commonwealth via its opportunity to defend this conviction against Coss's PCHA petition; the Commonwealth has forfeited further consideration of this "right" by its seven years of inaction. To my mind, the majority's relief gives the courts of the Commonwealth a "free ride" for no apparent reason.

The assumptions underlying the second part of the majority's question — referring to the possibility of a "free ride" for Coss — are equally inaccurate. I reject the implication that a person who has already served a prison

sentence on a conviction that was secured in violation of his Sixth Amendment rights has gotten a "free ride." The majority opinion, in stating that resentencing would provide a windfall to recidivists, seems to believe that a criminal defendant would lie in wait while serving an invalid prison sentence, refusing to contest this initial sentence because of a potential future benefit to him of a later challenge to this sentence in the context of an enhancement proceeding on a hypothetical crime that he has not yet committed.[13] Such an image of what motivates an imprisoned convict strains credulity, and has the additional flaw of having been explicitly rejected by the Supreme Court. In *Garlotte v. Fordice*, 515 U.S. 39, 41 (1995), the Supreme Court held that a prisoner serving consecutive state sentences is "in custody" for habeas purposes on all the consecutive sentences, even those that were scheduled to run first and that had therefore already expired at the time of the petition. The Court rejected the argument that this holding would encourage prisoners to delay raising their claims: "A prisoner naturally prefers release sooner to release later. Further, because the habeas petitioner generally bears the burden of proof, delay is apt to disadvantage the petitioner more than the State." *Id.* at 46. The Court's observations in Garlotte are equally applicable to Coss's case.[14] I therefore find that

13. It is also worth noting that in order to take advantage of this speculative future benefit, our defendant would have to run the "exhaustion" gauntlet of state post-conviction proceedings, and, of course, to prevail on the merits of the *Strickland* test, a heavy burden indeed.

14. It is obvious that Coss himself has made no such strategic decision to delay a challenge to his 1986 conviction. In fact, the (Cont'd)

the majority's specter of a "free ride" is without substance here.[15]

In sum, I can find no support for the majority's choice of relief. I express no opinion on the question whether it would in some other case be possible for us to order such relief. Rather, I would decline to reach that difficult question, and would instead reverse the District Court's denial of Coss's habeas petition and remand to the District Court with instructions that it order a writ of habeas corpus to issue conditioned upon Coss's being resentenced on the 1990 conviction without consideration of the previous 1986 assault conviction. Such relief would comport with the traditional principles of habeas jurisdiction by giving the tribunal that incorrectly subjected Coss to his only current "custody" —

(Cont'd)
District Court's reference to the fact that Coss's PCHA petition challenging the 1986 conviction was pending for "about seven years" before Coss filed the instant § 2254 petition in 1994 makes it clear that Coss challenged the 1986 conviction well before the commission of the offense of which he was convicted in 1990. District Court opinion at 9.

15. One last observation is in order concerning the risk of a "free ride" in this or any other unconstitutional enhancement challenge. Were we to condition our writ on the Commonwealth's resentencing Coss on the 1990 conviction, the sentencing judge would presumably be able to take into account the underlying *facts* at issue in the 1986 conviction, if sufficiently proven, even though our order would bar it from taking the tainted *conviction* itself into account. This ability to consider the facts of a defendant's possible prior bad act reduces the possibility that the defendant can get a "free ride."

namely, the 1990 sentencing court — the opportunity to correct its error by resentencing Coss, ridding his sentence of the unconstitutional taint of his prior conviction.

Judge McKEE joins in this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7416

EDWARD R. COSS, JR.,

Appellant

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 94-cv-1481)
District Judge: Honorable Thomas I. Vanaskie

Argued March 1, 1999

Before: STAPLETON, RENDELL and ALDISERT,
Circuit Judges

(Filed June 28, 1999)

* * *

Appendix B

OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Edward Coss ("Coss" or "appellant") urges us to reverse the District Court's denial of his motion for habeas corpus relief filed pursuant to 28 U.S.C. § 2254. Coss argues that his counsel's failure to subpoena certain witnesses to testify at his trial constitutes ineffective assistance of counsel and that the District Court erred in failing to so rule. For the reasons stated below, we will reverse the District Court's denial of Coss' ineffective assistance claim and remand to the District Court to issue a conditional writ of habeas corpus.

I. Facts[1]

On June 25, 1986, Coss, aged 17, attended a party at the home of his sister, Carol Ann Frank. Also in attendance were Coss' brothers, Jimmy and Bobby, Coss' girlfriend, Sherry Kulick, Carol Ann's roommate, Lisa Frieto, and Lisa's brother, George Frieto. Most of the guests at the party consumed alcohol. During the course of the party, an argument started between Sherry and Lisa, and thereafter, caused other arguments to erupt among the other guests. These arguments caused Carol Ann to throw everyone out of her house. Arguments continued outside of Carol Ann's house, including one between Jimmy, who was holding a baseball bat, and Coss. As a result of all the noise, Carol Ann's landlord called the police. The police arrived at the

1. Although at his trial Coss' story differed from the facts we recount here, the. District Court clearly credited this version of events, as does Coss implicitly by the very filing of his motion.

scene and tried to quell the fights that had developed on Carol Ann's front lawn. Coss was arrested for disorderly conduct and taken to police headquarters.

That night, Coss was held in the Lackawanna County Detention Facility for underage drinking. Coss damaged the cell in which he was placed and was ultimately charged with institutional vandalism, criminal mischief, criminal trespass, simple assault, theft by unlawful taking or disposition, aggravated assault, resisting arrest, terroristic threats, and disorderly conduct.

Coss met with his assigned attorney, RoseAnn McGowan, two times before his trial. The District Court made the finding of fact that Coss gave McGowan the names and addresses of several potential witnesses during their first meeting.[2] Counsel gave Coss no notice of the trial date but

2. Coss testified at the evidentiary hearing that in the first meeting, he and McGowan discussed "the whole entire story, how it happened, [and] who was involved." Coss' second and final meeting with McGowan prior to his trial occurred after a severance motion, requesting that the charges in connection with the simple assault be severed from those filed for the damage to the juvenile detention center, was filed in September 1986. Coss alleges that he and McGowan also discussed the names of possible witnesses at this meeting. McGowan did not testify regarding her version or what occurred at these meetings. She did testify at the evidentiary hearing that Coss did not give her the names of any witnesses he wanted her to subpoena, but then admitted that she did not specifically remember Coss' case and was instead testifying based on her general practice as a public defender.

The court also noted that, even if Coss did not provide the names to McGowan at this time, a cursory review of the police reports would have identified the names and addresses of some of these witnesses.

contacted him approximately one hour before the trial was to begin, at which point Coss drove directly to the courthouse, stopping only to pick up his brother Jimmy at school.

Coss' trial began on October 30, 1986 and lasted two days. At the trial, the officers who arrested Coss, Officers Adamitis and Wrobel, testified that when they arrived at the scene, individuals began scattering and that they grabbed Coss as he was running to his car. They testified that Coss was screaming vulgarities and smelled of alcohol. They testified that, after being grabbed, Coss began pushing Officer Wrobel and was then arrested. They also testified that as Officer Adamitis attempted to grab Coss' brother Bobby, Coss punched Officer Adamitis in the face. This punch is the basis for Coss' simple assault charge, which is the charge at issue in this appeal. Finally, Officer Wrobel testified that an individual named George also hindered their attempts to arrest Bobby.

The only witnesses to testify on Coss' behalf were Coss and Jimmy.[3] They testified that, on the night in question, they were in their sister's driveway, along with their brother Bobby, and had been there no more than fifteen minutes when two police officers arrived and began to assault Bobby and Coss. Coss stated that there was no party at Carol Ann's house that night, that he had not been drinking, that he did not curse or punch anyone, and that he did not know who the officer was referring to when he stated that an individual

3. McGowan did not suggest that Jimmy testify. Instead, Coss, on his own initiative, brought Jimmy to the trial and asked him to testify. McGowan admitted that she never subpoenaed, interviewed, or prepared Jimmy.

named George was at the scene. Jimmy corroborated this story, stating that there was no party at Carol Ann's, that they were only at Carol Ann's house to give her a camera, that he had not been drinking, and that Coss did not hit a police officer.

The charges ultimately presented to the jury were institutional vandalism and criminal mischief, simple assault, resisting arrest, and disorderly conduct. The jury convicted Coss of institutional vandalism, criminal mischief, and simple assault.[4] Coss was sentenced on January 30, 1987, receiving six months to one year on the simple assault charge and six months to one year on the institutional vandalism charge. The simple assault and institutional vandalism/ criminal mischief sentences ran consecutively. Coss has already served his sentence for these convictions. Presently, he is serving a sentence based on charges from a 1990 conviction, unrelated to his 1986 convictions. Although he has served the term for the assault charge, Coss urges that his claim is not moot because the assault charge was used to enhance the sentence from a 1990 conviction for which he is still being punished.

II. Procedural Posture

On September 15, 1994, Coss filed a pro se petition for writ of habeas corpus pursuant to § 2254. Coss filed an amended petition on November 29, 1995, and a Second Petition for Writ of Habeas Corpus on November 7, 1996.

4. The institutional vandalism and criminal mischief result from Coss' destruction of the detention cell and are not related to Coss' interaction with the police outside of Carol Ann's house.

In the petition, Coss claimed that he was denied his Sixth Amendment right to effective assistance of counsel based on, among other things, counsel's failure to subpoena any of the witnesses he requested.[5]

On April 20, 1998, an evidentiary hearing was held to address Coss' ineffective assistance of counsel claims. At the hearing, each of the witnesses that Coss stated he had identified to counsel, namely, Carol Ann, Bobby, Sherry, and George, testified that McGowan never contacted them regarding Coss' trial and that Coss did not strike any police officer. Bobby, Sherry, and George testified that the first thing that the police did upon arrival was approach Coss and place him in the back of one of the police cars. They testified that the police then chased after Bobby, at which point George jumped on the back of one of the officers to try to hinder his attempt to arrest Bobby. Thus, according to these witnesses' testimony, Coss was in the police car the entire time the police attempted to arrest Bobby. According to the District Court, "McGowan's recollection of the case [at the evidentiary hearing] was somewhat sketchy."[6] She conceded

5. Coss also alleged that his counsel was ineffective for empaneling two jurors adverse to Coss' interests, failing to have the institutional vandalism and criminal mischief charges dismissed, and failing to file post-trial motions. The District Court dismissed these other bases of ineffective counsel and Coss does not appeal their dismissal.

6. From a review of the evidentiary hearing transcript, we agree with the District Court's characterization of McGowan's memory of this case. McGowan was asked the following at the evidentiary hearing:

(Cont'd)

(Cont'd)

> Q. Ms. McGowan, is your testimony, today, based on actual recollection or this particular case, the Coss case, or are you testifying, based upon your general practice, as a Public Defender, when you were employed in the Public Defender's Office?
>
> A. It would — it would be in part, yes, and in part, no. Because certain portions that I've responded to, I have direct recollection. As I said, I have direct recollection — once I looked at the sentencing report, I had direct recollection, exactly, what had transpired. I mean, once Mr. Coss told Judge Cottone, according to the transcript, that he was thinking about an appeal, but they were telling him this, and then I just — I recalled. I do recall distinctly, exactly, that they — the they .. was advising him this way, and he would not listen to me, okay? When we wanted to file the Post-trial Motions on that, he did not want them. . . . That is direct recollection. Now, the other stuff may be general.
>
> . . . .
>
> Q. Ms. McGowan, what I'm asking you about is, do you, specifically, remember having this conversation with Eddie Coss about these witnesses or is your testimony that this is how you normally conduct yourself?
>
> A. No, no. No, no, no, it wouldn't be. I would have asked him what about these people, what about these, what about these? You know, what were they doing there or how are they related to this?

This questioning proceeds, with McGowan answering the questions regarding her failure to subpoena the witnesses in the form of what she "would have" done or what Coss "must have" said, as opposed to telling the court what she "did" or what Coss "said."

during the hearing that she did not investigate the events surrounding Coss' arrest, electing not to dispatch her investigator to interview any of the witnesses at issue, and defended her actions by stating that "Coss must have told her not to subpoena them." Dist. Ct. Op. at 16 (June 10, 1998).

Following the hearing, the District Court denied Coss' ineffective assistance of counsel claims. The court held that, although McGowan's failure to subpoena these witnesses "fell below an objective standard of reasonableness," Coss failed to prove that he was prejudiced by McGowan's failure because the verdict would not have been different given the inconsistency in the accounts told by Coss and his brother on the one hand, and the witnesses and the police on the other. Coss appeals this decision of the District Court, arguing on appeal that the District Court erred in its application of the prejudice prong of the ineffective assistance of counsel test as stated in *Strickland v. Washington*, 466 U.S. 668 (1984).

III. Jurisdiction

Before proceeding to the merits of Coss' ineffective counsel claim, we will first review whether the District Court had subject matter jurisdiction over this habeas petition. Section 2254 confers jurisdiction on United States district courts to entertain petitions for habeas corpus relief only from persons who are "in custody" in violation of the Constitution or laws or treaties of the United States. The Supreme Court has interpreted § 2254 as mandating that the petitioner be "in custody" pursuant to the conviction or sentence he seeks

to attack at the time his petition is filed. *See Carafas v. LaVallee*, 391 U.S. 234 (1968). A habeas petitioner does not remain "in custody" under a conviction "after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam). A petitioner does, however, satisfy the "in custody" requirement for federal habeas jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction. *Id.* at 493. Moreover, in *United States v. Tucker*, 404 U.S. 443 (1972), the Supreme Court held that a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence. *See also Young v. Vaughn*, 83 F.3d 72, 76 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence").

In this case, although Coss has already served the sentence resulting from the allegedly unconstitutional 1986 convictions, he is currently serving a sentence for an unrelated, 1990 conviction in the Court of Common Pleas of Lackawanna County for aggravated assault. Coss alleges that the sentence from his 1990 conviction was adversely affected by the 1986 assault conviction. The sentencing judge did, in fact, refer to Coss' 1986 conviction for assaulting a police officer in sentencing him to the top of the standard range for his 1990 conviction. Coss is thus attacking his prior

conviction in an attempt to have his current sentence, which relied on his prior conviction, reevaluated. The District Court therefore appropriately construed Coss' petition as challenging the 1990 conviction for aggravated assault rather than his expired conviction, *see id.* at 73, and properly concluded that it had jurisdiction over his § 2254 motion petition. *Id.* We have appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253.

IV. Exhaustion

Absent a valid excuse, a habeas petitioner must present all federal claims to the state courts. 28 U.S.C. § 2254(b); *see also Rose v. Lundy*, 455 U.S. 509 (1982). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of the state courts in protecting federally guaranteed rights." *Evans v. Court of Common Pleas, Delaware County, Pa.*, 959 F.2d 1227, 1230 (3d Cir. 1992) (citing *O'Halloran v. Ryan*, 835 F.2d 506, 509 (3d Cir. 1987)). Of course, "[i]nexcusable or inordinate delay by the state in processing claims for relief they render the state remedy effectively unavailable" and exhaustion will be excused. *Wojtczak v. Fulcomer*, 800 F.2d 353, 354 (3d Cir. 1986).

Prior to filing his § 2254 petition, Coss had a petition challenging his 1986 conviction pending under Pennsylvania's Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat. § 9541, *et seq.* (amended 1988), for approximately seven years without any activity. Under these circumstances, the District Court excused the exhaustion

requirement and we can find no fault with that determination. Appellant has not, however, presented to the Pennsylvania state courts his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990, the conviction being challenged by the underlying habeas petition. Nonetheless, we conclude that this is not a situation in which the District Court was faced with a mixed petition necessitating a dismissal under *Rose v. Lundy*. As was made clear by the Pennsylvania Supreme Court in *Commonwealth v. Ahlborn*, 699 A.2d 718 (1997), collateral relief is not available under either the Post Conviction Hearing Act or under the common law remedies of state habeas corpus or coram nobis for a petitioner who is not currently serving a sentence of imprisonment for the conviction he wishes to challenge, even if petitioner contends that collateral consequences stem from that conviction. Accordingly, insofar as state law clearly forecloses state court review of Coss' "collateral consequence" claim, the District Court properly excused exhaustion and entertained the claim on its merit.[7] *See, e.g.*, *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986) (citing *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam)).

V. Applicable Law

Because Coss submitted filings to the District Court both before and after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we think

7. We view *Commonwealth v. Ahlborn* not as erecting a "procedural bar," but as a statement that there is no available state remedy for the claim that the present sentence was incorrectly enhanced by an invalid prior conviction.

it necessary to briefly discuss the law governing this action. We conclude that the amendments brought about by AEDPA do not apply to this case as Coss' original petition and amendment were both filed prior to AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320 (1997); *McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999); *United States v. Skandier*, 125 F.3d 178 (3d Cir. 1997). Though Coss did file a "Second Petition" in November 1996, i.e., after the enactment of AEDPA, that petition did not add new claims, but merely waived, as was permitted by the District Court's order of October 23, 1996, those claims presented in his original petition that were determined by the District Court to be unexhausted. *See, e.g.*, *Rose*, 455 U.S. at 510 (a petitioner may amend his petition to delete unexhausted claims); *McMahon v. Fulcomer*, 821 F.2d 934 (3d Cir. 1987) (same).

Amendments to applications for writs of habeas corpus are statutorily provided for by 28 U.S.C. § 2242, which states that such petitions "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." *See* Rule 11 of the Rules Governing Section 2254 Cases; *see also Calderon v. Ashmus*, 523 U.S. 740, __, 118 S. Ct. 1694, 1700 (1998) (Breyer, J., concurring) (amendments to habeas petitions under Rule 11 are governed by Fed. R. Civ. P. 15 unless otherwise expressly governed by the statute). In accordance with Rule 15(a), a party may amend a pleading after a responsive pleading has been served "by leave of court." Fed. R. Civ. P. 15(a). Moreover, pursuant to Rule 15(c)(2) of the Federal Rules of Civil Procedure, if the claim asserted in the amended petition "arose out of the conduct, transaction, or occurrences set forth" in the original petition, the amendment of the pleading relates back to the

date the original petition was filed. As noted previously, the claims in Coss' second amended petition not only "arose out of the conduct" set forth in the original habeas petition and amendment, they were the same claims, minus those that were unexhausted. In fairness, we view his petition filed after AEDPA as tantamount to a further amendment to his initial filing, which he filed at the direction of the District Court, expressing Coss' intention to proceed with his exhausted claims. Therefore, we view all the claims raised as having been asserted in a petition filed prior to AEDPA's enactment date. Accordingly, under pre-AEDPA habeas requirements, Coss was obligated to obtain a certificate of probable cause in order to appeal from the District Court's judgment dismissing his habeas corpus petition.

The pre-AEDPA certificate of probable cause did not require specification of issues and placed the entire case before the court of appeals. *See Ramsey v. Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998); *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996): *see also United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3d Cir. 1978). The post-AEDPA certificate of appealability, on the other hand, requires specification as to which issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2), i.e., those issues for which the applicant has made a substantial showing of the denial of a constitutional right. In the instant case, rather than granting appellant a certificate of probable cause to appeal, the District Court granted Coss a certificate of appealability limited to his claim that counsel rendered constitutionally ineffective assistance by failing to subpoena witnesses on the assault charge. Under pre-AEDPA law we determined that it is inappropriate for a District Court to prescribe the

issues or issue which may be considered in support of or in opposition to a judgment, *Hickey*, 571 F.2d at 766, and appellant is free to choose which claims to assert on appeal. In this case, however, because Coss, through his attorney, limited his request for a certificate of appealability on appeal to the one issue he believed to be of "arguable merit," that is, the ineffectiveness of counsel claim at issue, we see no reason to extend our review beyond the merits of that claim. Moreover, given our disposition of the appeal, we see little difference an expanded review would make.

VI. Discussion

At issue is the District Court's application of the prejudice prong of the *Strickland* ineffective assistance of counsel test. Since Coss' claim involves the legal component of an ineffective assistance of counsel claim, we exercise plenary review. *See Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998).

In order to obtain relief based on an ineffective assistance of counsel claim, a defendant must not only show that his counsel's performance was objectively unreasonable, but also that it prejudiced his case. *See Strickland v. Washington*, 466 U.S. at 692. The District Court denied Coss habeas relief, despite its finding that counsel's failure to subpoena the witnesses at issue was objectively unreasonable, because Coss had failed to demonstrate prejudice.[8]

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8. We are not asked to review the issue of the reasonableness of counsel's actions as justifiable or strategic decisions. Here, Coss' attorney claimed no tactical merit to her failures except to say that she must have done what Coss wanted in not subpoenaing witnesses; nor does the government contest the District Court's finding that her conduct "fell below objective standards of reasonableness."

To prove prejudice under the second prong of the *Strickland* test, a defendant must "establish a reasonable probability — one sufficient to undermine our confidence in the outcome — that the jury's verdict would have been different if not for counsel's errors." *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989). The District Court reached its conclusion that Coss had failed to demonstrate prejudice based on the fact that the witnesses who testified at the evidentiary hearing painted a completely different picture of the incident leading to Coss' arrest from that told by Coss and Jimmy at trial. The testimony at the evidentiary hearing made clear that, on the night of the incident, Coss had been drinking at a party that had to be broken up by the police. This version of events is a far cry from Coss' trial testimony of a calm, quiet evening sabotaged by two rogue police officers. Assuming that, regardless of counsel's error, Coss still would have testified, and would have testified in the way that he did, the District Court reasoned that the failure to call these witnesses was not prejudicial to Coss, as their testimony, if offered, would only have suggested to the jury that Coss was lying on the witness stand and that Coss was drunk and excitable during the incident. Because this case turned on a credibility determination between Coss and the officers, the District Court reasoned that Coss could not have been prejudiced by counsel's failure to call witnesses who only would have contradicted Coss' version of the facts, destroying his credibility with the jury.[9] The District Court

9. The District Court also considered that Carol Ann and Bobby's testimony would have been suspect since they are Coss' siblings, that Sherry's testimony would have been suspect since she was Coss' girlfriend, and that George Frieto's testimony, while (Cont'd)

thus concluded that the outcome of the trial would have been no different, that is, Coss still would have been found guilty of assaulting the officer, absent counsel's failure.

We disagree with the District Court's reasoning. While it is unlikely that a court can determine with certainty the result of the proceedings absent counsel's error, we must examine the "breadth of the evidence" and examine whether it is sufficient to undermine our confidence that the case would have come out in the way that it did absent counsel's errors. *United States v. Kauffman*, 109 F.3d 186, 191 (3d Cir. 1997). Having examined the breadth of the evidence in this case, including the evidentiary hearing transcript, we conclude that there is a reasonable probability that, had counsel subpoenaed the witnesses at issue, Coss would not have been found guilty of assaulting the officer.

As a result of counsel's failure to conduct an investigation into the events surrounding Coss' arrest on the night of June 25, 1986, only Coss and his younger brother Jimmy testified in Coss' defense. It cannot be doubted that Coss and Jimmy decided to try to conceal what had occurred that evening — that is, the fact that on the night in question they were drinking, underage, at a party — during their testimony. Regardless of Coss' motivation to lie about the context of the incident provoking his arrest, he and Jimmy testified that Coss did not assault a police officer. At the

(Cont'd)
seemingly beneficial to Coss in that he testified that it was he who attacked the officer, is also not inconsistent with the officer's testimony that an individual named George, in addition to Coss, tried to hinder Bobby's arrest.

evidentiary hearing held to investigate Coss' ineffective counsel claims, Carol Ann, Bobby, Sherry, and George all testified that there was a party at Carol Ann's house, that the people at the party were consuming alcohol, that a fight broke out, and that the police came to break up the fight. Most importantly, however, Carol Ann, Bobby, Sherry, and George testified consistently that Coss did not punch a police officer, and Bobby, Sherry, and George testified consistently that George jumped on a police officer's back when the officer assaulted Bobby. Finally, they also testified consistently that, at the time the officers arrested Bobby, which, according to the officers, is the time that Coss punched the officer, Coss was sitting in the police car with the door shut.[10] Thus, although the witnesses' rendition of what happened on the night in question conflicts in large part with Coss' original version of the story, all accounts of the evening are consistent in their most significant respect, the fact that Coss did not commit the assault alleged.

In our view, the District Court employed too narrow an approach in analyzing Coss' claim of prejudice. When it reached the prejudice prong of the *Strickland* test, the District Court stated that " '[p]rejudice' to a defendant from the failure to call witnesses should be assessed *in the context of the other testimony presented by the defense witnesses*." Dist. Ct. Op. at 18 (June 10, 1998) (emphasis added). The District Court then asked whether the result of this trial would have been any different if, instead of only Coss and Jimmy testifying in Coss' defense, Coss, Jimmy, and the other four

10. It is important to note that all witnesses at the evidentiary hearing were sequestered, thus bolstering the credibility of these witnesses' convincingly consistent versions of the critical events.

witnesses had testified in Coss' defense, assuming not only that Coss would still testify, but would tell the tale that he did at trial.

Strickland requires that a court consider "the totality of the evidence before the judge or jury" in determining prejudice. 466 U.S. at 695. It does not require, however, the court to ignore the way in which the "totality" would present itself if counsel's conduct had been objectively reasonable. *Strickland* also recognizes that some errors are so great that a court cannot merely recall the proceedings as they occurred with counsel's error, and then, as the District Court did here, merely add the evidence not presented to determine the alternative outcome of the trial absent counsel's mistake. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 696-97.

Here, counsel's error had a pervasive effect, altering the entire evidentiary picture at trial. The testimony of the witnesses not presented should not be considered as merely a hypothetical supplement to the evidence offered, with the remainder of the trial presumed to unfold as it actually did. Considering the totality of the evidence, we believe that, had counsel subpoenaed the witnesses and heard from them their version of the events, including the fact that, although the police were partially correct in their allegations, it was George, not Coss, who assaulted the officer, she would not have presented at trial all versions of the evening's events, including Coss' clearly fictional rendition. When we assume the reasonably probable outcome without counsel's

ineffectiveness, we must also assume a scenario that envisions counsel's acting effectively.[11] The District Court should have realized and considered the different course that the trial would probably have taken had counsel acted in an objectively reasonable manner by subpoenaing and interviewing these witnesses, and then presenting a defense consistent with their testimony. If counsel had interviewed these witnesses, we believe that there is a reasonable probability that Coss would not have testified at all, or that Coss would have testified consistently with the other witnesses, thus avoiding the contradictory testimony that troubled the District Court.

We also note that recent Supreme Court jurisprudence has provided additional insight into the "outcome" test, which suggests that, in determining whether a defendant was prejudiced by counsel's ineffectiveness, we should also inquire whether counsel's conduct rendered the verdict "unreliable." Because the outcome test can produce untoward results depending on the facts, the Supreme Court has emphasized that the prejudice inquiry, at its core, involves concepts of reliability and fairness. In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Supreme Court was faced with the

11. In fact, as pointed out by appellant, if counsel had put both Coss and the witnesses at issue on the stand and presented an inconsistent theory of defense, that in itself could constitute ineffective assistance. *See Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994). Of course, counsel cannot rely on *Bland* to say that it was proper for her not to offer the witnesses' testimony in her attempt to present a consistent theory of defense, since she did not interview these witnesses to know of any inconsistency.

question of "whether counsel's failure to make an objection in a state criminal sentencing proceeding — an objection that would have been supported by a decision which subsequently was overruled — constitutes 'prejudice' " under *Strickland*. 506 U.S. at 366. The court of appeals, in a divided opinion, had upheld defendant's ineffective counsel claim, even though it had two years earlier overruled the decision that was the basis for defendant's ineffectiveness claim; thus, the omitted objection that was the basis of counsel's alleged ineffectiveness would have been overruled under current law.[12] *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 506 U.S. 364 (1993). The majority reasoned that defendant was entitled to the circuit's case law that was in effect at the time of his sentencing because, if counsel had made the objection at issue at that time, the trial court would have had to sustain it and the outcome of the proceeding would have been different. *Id.* at 577. The Supreme Court reversed this decision, stating that the prejudice component of the *Strickland* test focuses not just on whether the outcome of a proceeding would have been different but for counsel's ineffectiveness, but on "whether counsel's deficient performance renders the result of the trial

12. Defendant argued that his counsel should have made an objection based on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985) (holding that a death sentence is unconstitutional if it is based on an aggravating factor that duplicates an element of the underlying felony). The Eighth Circuit overruled *Collins* in light of the Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (holding that a death sentence was not invalid on the ground that the sole aggravating circumstance found by the jury was identical to an element of the capital crime of which defendant was convicted). *See Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989) (overruling *Collins* in light of *Lowenfield*).

unreliable or the proceeding fundamentally unfair." *Fretwell*, 506 U.S. at 372. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* The Court concluded that, despite the fact that defendant was not reaping the benefit of the law in effect at the time of his sentencing, since current case law held that a defendant was not entitled to the particular objection at issue, defendant had not been denied any substantive or procedural right to which the law entitles him and "[t]he result of the sentencing proceeding in the present case was neither unfair nor unreliable." *Id.* at 371. In so honing and clarifying the prejudice test, the court harkened back to similar reasoning in *Nix v. Whiteside*, 475 U.S. 157 (1986).[13]

While in both *Nix v. Whiteside* and *Lockhart v. Fretwell* the application of concepts of reliability and fairness caused the court to conclude that a defendant was *not* prejudiced even though the outcome would have been different absent

13. In *Nix v. Whiteside*, the defendant argued that he received ineffective assistance of counsel because his counsel refused to aid him in presenting perjured testimony. Although it seems likely that such conduct on the part of counsel could have an effect on the trial's outcome, the Court held as a matter of law that "counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry." *Nix*, 475 U.S. at 175. The Court reasoned that, under *Strickland*, the "benchmark" of an ineffective-assistance claim is the fairness and reliability of the adversary proceeding, and that "[w]hether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result or his trial has been diminished by his desisting from the contemplated perjury." *Id.*

counsel's alleged ineffectiveness, we find the reasoning of these opinions to be helpful nonetheless here, where in the process of examining the probable effect of counsel's error, the District Court did not consider whether the proceeding reached an unreliable, unfair result. *See Fretwell*, 946 F.2d at 579 (dissenting opinion).

Our analysis of this aspect of the second prong of *Strickland* is not unlike our ruling in *Kauffman*, 109 F.3d 186, in which we held that defense counsel was ineffective for failing to investigate an insanity defense for a defendant when counsel had received a letter from a doctor supporting such a defense. Counsel claimed that he did not pursue this defense, and instead encouraged his client to plead guilty, because he viewed the insanity defense as inconsistent with defendant's conduct that demonstrated that he knew and appreciated the criminal nature of his acts. The district court had found no ineffectiveness and no prejudice because it concluded that the outcome would probably have been the same — *Kauffman* would have been found guilty — with or without counsel's alleged ineffectiveness. On appeal, however, we noted that "the breadth of the evidence adduced at the evidentiary hearing is sufficient to undermine our confidence that Zorbaugh would have advised his client to plead guilty rather than proceed to trial and that Kauffman would have accepted that advice." *Id.* at 191. Defendant was prejudiced by counsel's conduct because there was a reasonable probability "that the outcome of these proceedings would have been different had his counsel not failed in this duty to investigate the evidence obtainable from various health professionals." *Id.* In essence, we used our own skepticism regarding the reliability and fairness of the result to inform our determination as to the outcome.

While we do not wish to overstate the applicability of *Nix* and *Fretwell* to the instant situation — since they are clearly distinguishable — nevertheless, they act as a reminder that the concept of reliability and fairness should serve as a guide as we make the prejudice determination. In determining whether there is a reasonable probability that the outcome would have been different absent counsel's ineffectiveness, the district court should look at whether the outcome that did occur was reliable and fair in light of all the evidence before it. In *Kauffman*, that evidence demonstrated that the defendant may well have been totally psychotic and therefore not guilty; similarly, here, that evidence tended to show that Coss was innocent of the assault charge. The results reached in the trial were unreliable and the outcome, had counsel been effective, may well have been different. We think that it is helpful to consider the reliability and fairness of the result reached as an aid to reaching the appropriate conclusion as to the probable outcome had counsel's ineffectiveness not been a factor.

Thus, we believe that counsel's failure to subpoena these witnesses who would have all testified as to Coss' innocence as to the simple assault renders the District Court's view that the outcome of the trial would have been the same with or without these witnesses to be flawed. In light of the amount of exculpatory evidence that was in fact available, yet not presented to the jury, we believe that counsel's conduct made the result of Coss' trial fundamentally unfair and unreliable, and the outcome would have likely been different if the witnesses had been called. Thus, Coss has met his burden under *Strickland*, and subsequent Supreme Court case law clarifying *Strickland*, to prove that he was prejudiced by his counsel's failure to subpoena the witnesses at issue.

VII. Relief

Having determined that Coss' conviction for assault is constitutionally defective, we must determine what habeas relief should be afforded to him. We would normally remand this issue for determination by the District Court, but due to our concern for the defendant's continued confinement based on an unconstitutional conviction — assuming the assault conviction did in fact play a role in enhancing the sentence he now serves — and because the issue is one that has not previously received specific attention in the courts, we will determine the relief we will provide, requiring that the writ be conditioned as we deem appropriate.

We must decide between the two apparent choices for relief: condition the writ on the state's granting Coss a retrial on the 1986 assault charge and, if the result of the retrial differs from the previous result; a subsequent resentencing on Coss' current conviction, removing from Coss' current sentence any enhancement based on the prior unconstitutional conviction; or, condition the writ on the state's resentencing of Coss for his current conviction without any enhancement due to the prior unconstitutional conviction.[14] While a retrial is the usual relief granted in a habeas proceeding based on ineffective assistance of counsel in connection with a current conviction, the Supreme Court precedent has required only resentencing absent consideration of the prior, unconstitutional conviction as the proper relief in this situation. *See Tucker*, 404 U.S. 443. For

14. In his various habeas petitions, Coss has consistently sought a new trial and a new sentencing hearing.

the reasons stated herein, we conclude that the proper relief under these circumstances is the latter of these two options, resentencing absent consideration of the unconstitutional conviction.

The writ of habeas corpus is a civil remedy against unconstitutional confinement. *See Fay v. Noia*, 372 U.S. 391, 423-24 (1963). It is not "a stage of the state criminal proceedings" or "an appeal therefrom." *Id.* at 424. Thus, in an important way, habeas proceedings are independent from the criminal proceedings that have already occurred, serving only to judge and to correct that which results in unconstitutional confinement. In many cases, the issue of unconstitutional confinement is unrelated to the question of guilt or innocence. It may, as in the case at hand, relate to a current sentence that has been enhanced by an expired, yet unconstitutional conviction. A sentence which is enhanced based on a prior unconstitutional conviction, although appearing more attenuated from the actual wrong than a person's incarceration following an unconstitutional trial, is nonetheless unconstitutional confinement and must be corrected. *See Tucker*, 404 U.S. at 449.

We are guided by the Supreme Court decision in *Tucker* in which, as here, the Court granted habeas relief based on a prior conviction that had been served in full, but that had an enhancement effect on the petitioner's current sentence. The Court found the petitioner's current confinement unconstitutional because it was based, in part, on a prior conviction resulting from a trial at which he was denied his constitutional right to counsel. Without any consideration of the petitioner's probable guilt or innocence as to the prior

offense, the Court ordered the writ conditioned upon petitioner's resentencing absent any consideration of the prior, unconstitutional conviction. Since the prior conviction was found unconstitutional, it could have no impact on the petitioner's current sentence. *See id.* at 447-48 (stating that the real question is not whether the outcome of the earlier prosecutions would have been different if Tucker had counsel, "but whether the sentence . . . might have been different if the sentencing judge had known that at least two of [Tucker's] previous convictions had been unconstitutionally obtained").

In *Maleng v. Cook*, the Court was faced with the issue of whether the petitioner was "in custody" in order to confer habeas jurisdiction such that the petitioner could challenge his sentence, enhanced by an allegedly unconstitutional, expired conviction. The Court limited itself to the narrow issue of custody, but expressly recognized the possibility of challenging an expired conviction in connection with an attack on a current sentence enhanced by the prior conviction. In this case, however, unlike *Tucker*, the prior conviction was challenged based on the court's failure to hold a competency hearing.

We have since applied the reasoning in *Tucker* and *Maleng*, holding in *Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989), that habeas relief was available to a petitioner whose current sentence was based in part on prior convictions tainted by the denial of his constitutional right to due process. Consistent with the relief granted in *Tucker*, we granted the petitioner's writ conditioned on resentencing for the subsequent offense absent consideration of the prior

conviction. *Id.* at 1149 n.10 (stating that the only relief available under *Tucker* is resentencing). In *Young v. Vaughn*, we again applied the reasoning of *Tucker*, holding that the petitioner could challenge his prior conviction, held unconstitutional due to ineffective assistance of counsel, if this conviction was used to enhance his current sentence.[15] Since in *Young* we were addressing only our jurisdiction to hear the habeas petition, we did not specifically consider what relief was appropriate if the petition was successful.

We see no meaningful distinction between *Tucker* and its progeny and the case at hand to cause the relief in this case to be any different from that granted in *Tucker*. Both unconstitutional convictions, although expired, provided grounds for habeas relief because they resulted in the petitioners' serving sentences enhanced thereby, and were, thus, unconstitutional. Just as in *Tucker*, we cannot now

15. Other courts have also recognized this type of collateral consequences relief and have held, consistent with our decisions in *Clark* and *Young*, that complete denial of right to counsel, as in *Tucker*, is not the only constitutional violation justifying such relief. *See, e.g.*, *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994) (prior conviction challenged based on involuntary and uninformed plea); *Tredway v. Farley*, 35 F.3d 288 (7th Cir. 1994) (prior conviction challenged based on involuntary guilty plea); *Allen v. Collins*, 924 F.2d 88 (5th Cir. 1991) (prior conviction challenged based on ineffective assistance of counsel); *Battle v. Thomas*, 923 F.2d 165 (11th Cir. 1991) (prior conviction challenged based on ineffective assistance of counsel); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir. 1990) (prior conviction challenged based on involuntary and uninformed guilty pleas); *Taylor v. Armontrout*, 877 F.2d 726 (8th Cir. 1989) (prior conviction challenged based on involuntary guilty plea and ineffective assistance of counsel on appeal).

correct by retrial the unconstitutional incarceration resulting from the previous conviction, as that sentence has been served in its entirety. Instead, all that we can do is provide the state court with the opportunity to void Coss' current sentence of the ramifications, if any, resulting from the prior unconstitutional conviction.

Conditioning the writ on resentencing is consistent with the mandate in *Barry v. Brower*, 864 F.2d 294, 301 (3d Cir. 1988). In *Barry*, we warned that "[a] habeas court does not have power to directly intervene in the process of the tribunal which has incorrectly subjected the petitioner to the custody of the respondent official. . . . The respect due the tribunals of a sovereign state within our federal system, however, requires that its courts be given an opportunity to correct their own errors." In this case, we will give the tribunal which incorrectly subjected him to custody — namely, the sentencing court — the opportunity to correct its error by resentencing Coss, ridding his sentence of the unconstitutional taint of his prior conviction.

We realize that the sentencing court must now assess the extent to which the unconstitutional conviction impacted the sentence it handed down and resentence without including the prior offense in its thinking. While this may leave an open issue as to Coss' guilt or innocence of the assault, guilt or innocence is not our charge.[16] *See Herrera v. Collins*, 506

16. It might even be said that our determination here is more probative of Coss' actual guilt or innocence of the assault charge than was the determination in *Tucker*. Here, we determine not only that counsel was ineffective, but, in determining prejudice, we held that there was a reasonable probability that the outcome of Coss' (Cont'd)

U.S. 390, 400 (1993) (stating that "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact"); *Tucker*, 404 U.S. at 447-48 ("We need not speculate about whether the outcome of the respondent's . . . prosecutions would necessarily have been different if he had had the help of a lawyer."); S. Rep. No. 80-1526, at 2 (1948) ("Habeas corpus . . . is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, It is usually because some right . . . has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial.").[17] Habeas relief serves to rectify conditions of unconstitutional confinement. Coss is no longer confined for the previous assault conviction. Thus, we are to rid Coss' current confinement of its constitutional defect — which the reliance upon his previous conviction represents. Doing any more than this oversteps the bounds of our task on habeas review.[18]

(Cont'd)
trial would have been different such that Coss may well have been found not guilty. No such finding was required with the invalid conviction in *Tucker*, where we know little as to his actual commission or guilt of the offense, but prohibited its consideration because of its blatant unconstitutionality.

17. In fact, the actual innocence inquiry most often comes into play in habeas proceedings where a petitioner seeking relief on a potentially meritorious constitutional claim faces an otherwise dispositive procedural bar to review or relief. In these cases, the petitioner must proffer a colorable claim of innocence to defeat the bar. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993).

18. We have explained previously that federal courts walk a fine line in fashioning the appropriate relief on habeas review. *See* (Cont'd)

Further, while re-trying Coss' assault would make resentencing fully informed, we think this inappropriate given our limited role in applying habeas relief, as a retrial would have the untoward result of providing Coss with a method of attacking, and altering, the outcome of his assault trial in a way otherwise unavailable to him through direct and collateral review absent this second conviction.[19] It is one thing to enable a petitioner to attack the constitutionality of a prior conviction insofar as it impacts a later sentence; it is quite another to let him reach back and undo that conviction after the opportunity for challenging it on direct appeal and collateral proceedings has come and gone. The concept of

(Cont'd)
Henderson v. Frank, 155 F.3d 159, 168 (3d Cir. 1998) (explaining that the condition upon which the writ is issued must be fitted between two principles: minimizing intervention into the state criminal process and ensuring the cure of all constitutional defects).

19. Actually, Coss did present his ineffective assistance of counsel claim in a collateral challenge to his 1986 conviction filed pursuant to Pennsylvania's Post Conviction Hearing Act. This petition, which served as justification for the District Court to excuse the exhaustion requirement, has yet to be acted upon by the state courts. While Coss' petition remains pending, in all likelihood the state courts would refuse to entertain it at this late date. *See, e.g., Ahlborn*, 699 A.2d at 720 (stating that collateral relief is not available for a petitioner who is not currently serving a sentence or imprisonment for the conviction he wishes to challenge, even if collateral consequences stem from that conviction). Nonetheless, our resolution of Coss' habeas claim, and part of our rationale for declining to find that a new trial would be the appropriate relief here, stems from the fact that doing so would make this type of challenge available even if Coss had not raised this issue in connection with the review of his 1986 conviction.

challenging previous convictions as enhancers is a novel use of habeas; we should not let it bring about untoward results. *See* Alan C. Smith, Note, *More Than a Question of Forum: The Use of Unconstitutional Convictions to Enhance Sentences Following Custis v. United States*, 47 Stan. L. Rev. 1323, 1340 (1995) (stating that "the language in *Maleng* indicates the Court's reluctance to let defendants challenge prior convictions in the federal habeas forum" and that the "reasoning in *Custis* regarding the importance of finality and the difficulty of administering attacks on prior convictions also reveal[s] a desire to severely limit these claims").

Our view that resentencing on the more recent conviction is warranted, rather than a new trial on his 1986 assault charge, is also consistent with language in other case law discussing this unique habeas posture. While *Tucker* appears to be our sole guide as to the conditional relief appropriate in these circumstances, the developing jurisprudence focusing on these unique circumstances is consistent in noting that we are not attacking the expired conviction directly. Instead, the prior conviction may only be attacked in the "context of" the current sentence. *Young*, 83 F.3d at 78 (specifying that a defendant may only attack a prior conviction "in the context of a challenge to the enhanced sentence for which he is in custody"); *Gamble*, 898 F.2d at 118 (interpreting *Maleng* as precluding a defendant from challenging an expired conviction "directly," but stating that a defendant may attack a prior unconstitutional conviction in the context of its effect on a present sentence); *Taylor*, 877 F.2d at 727 (same); *see also Crank v. Duckworth*, 905 F.2d 1090, 1091 (7th Cir. 1990) ("That a person happens to be in custody is of course not a sufficient reason to rummage

through old judgments in search of ones that may be invalid. To obtain relief under § 2254 the prisoner must show that his current confinement violates the Constitution.").[20] It is in the context of his current sentence that Coss has attacked the previous conviction, and it is in that context, and limited to that context, that we will require habeas relief to be afforded to him.

Accordingly, we order that a writ shall issue conditioned upon Coss' being resentenced without consideration of the previous assault conviction.

VIII. Conclusion

For the reasons stated above, we will reverse the District Court's denial of Coss' habeas petition and remand to the District Court with instructions that it order a writ of habeas corpus to issue conditioned upon Coss' being resentenced without consideration of the previous assault conviction.

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20. We do not read *Brock v. Weston*, which did not expressly limit the condition or the writ on the petitioner's resentencing, but rather ordered the district court "to resolve the petitioner's challenge to [the prior] conviction," as inconsistent with our holding here. Instead, we interpret *Brock* as an order to rid the petitioner's current sentence of any ramifications from his prior unconstitutional conviction, not as an order to retry the petitioner on the expired conviction.

Appendix B

ALDISERT, *Circuit Judge*, concurring in part and dissenting in part.

Several important public policy and social welfare considerations divide the panel in this case, the facts of which, at first blush, seem very pedestrian, yet the grant of habeas corpus relief presents an extremely important question that goes to the heart of comity in the relationship of federal courts and state sovereignties in habeas corpus cases brought under 28 U.S.C. § 2254. In granting the writ, the majority denies the Commonwealth of Pennsylvania the option of correcting the constitutional infirmity of incompetency of counsel by means of new trial. I disagree with this result.

I adhere to the long line of cases in this court that typically condition the grant of the writ under § 2254 on allowing the state the option, where it is possible, to cure the constitutional infirmity. My experience in this court's tradition goes back 31 years when I wrote the court's opinion in *United States ex rel. Crosby v. Brierley*, 404 F.2d 790 (3d Cir. 1968), a Pennsylvania murder case in which we determined that the guilty plea was constitutionally infirm.[1]

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1. Therein we stated:

> Accordingly, we will vacate the order of the court below and remand the case with the direction that the district court issue a writ of habeas corpus without prejudice to the right of the Commonwealth of Pennsylvania to undertake appropriate action in the further prosecution of this matter.

404 F.2d at 802.

Appendix B

The precise issue that occupies our attention was not raised by the parties, but rather was injected by the majority without briefing or argument. Indeed, Coss did not even request the relief he is now receiving. In his Second Amended Habeas Corpus Petition, drafted by counsel, Coss simply sought a new trial of his 1986 conviction. *See* Joint App. at 19 ¶4 ("The above stated issues are meritorious and demonstrate that Coss was denied his due process right to a fair sentencing hearing and his Sixth (6th) Amendment right to effective assistance of counsel. Thus, Coss is entitled to a new trial and sentencing hearing with regard to his institutional vandalism, criminal mischief, and simple assault convictions.").

I.

This melancholy chronicle of events started with a simple assault and battery that took place on June 25, 1986, in the small city of Dickson in Lackawanna County, Pennsylvania, when the local police were called to a high school graduation party at the home of Carol Ann Frank, the sister of the then-17 year old Appellant, Edward Coss. It seems that Carol Ann's roommate, one Lisa Frieto, got into a hair pulling contest with another party goer, one Sherry Kulick, and thereafter the revelers, all of whom were juiced up, apparently picked sides and a grand donnybrook was had by all until Carol Ann, the hostess, a real party-pooper, threw everyone out of her house.

Undeterred by the great outdoors, the donnybrookers continued their carousing outside until the landlord and the neighbors called the police. When the cops arrived with their

usual greeting, "Break it up," there apparently was a slight problem in attitude adjustment, and the cops say that Coss threw a couple of punches at one of them, which landed Coss in the local lockup. Totally dissatisfied with the accommodations, Coss proceeded to voice his complaint by destroying a radiator, a sink, a toilet and a light fixture on the ceiling in his cell. For this, he was convicted of simple assault and institutional vandalism and sentenced to six months to a year on each offense. Coss did his time and was released to society on parole.

Seven or eight months after Coss was discharged from Pennsylvania parole supervision on August 30, 1989, a certain Peter Petrovich was beaten "by a group of five or six men, including appellant,"[2] and Coss was arrested and convicted on one count of aggravated assault and battery and one count of simple assault for his part in the group effort to register displeasure on Petrovich's person. Coss was sentenced to a term of six to twelve years imprisonment on the aggravated assault conviction and there is no question that the sentencing judge took into consideration his previous conviction of assault and battery.

II.

The panel is in agreement that a Sixth Amendment deprivation of competent counsel infected the trial for the 1986 offense. We have federal habeas corpus subject matter jurisdiction to reach this conclusion under 28 U.S.C. § 2254, even though Coss is no longer "in custody" for that offense

2. *See Commonwealth v. Coss*, 695 A.2d 831, 833 (Pa. Super. Ct. 1997).

— no longer imprisoned or on parole — because of the teachings of *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam), *Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989), and *Young v. Vaughn*, 83 F.3d 72 (3d Cir. 1996).

The majority's approach requires us to assess the rights of society as against the rights of the criminal following a determination that the criminal is in custody for a sentence that has been tainted by a constitutionally infirm conviction, for which the criminal is no longer in custody. The normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding. It cannot be controverted that had Coss filed his habeas petition during the period he was incarcerated or on parole from the first conviction and we decided that he had been deprived of his Sixth Amendment right to counsel, we would have accorded Pennsylvania the option of releasing him or correcting the infirmity by means of a new trial or other proceedings. *See, e.g., Henderson v. Frank*, 155 F.3d 159 (3d Cir. 1998); *Barry v. Brower*, 864 F.2d 294 (3d Cir. 1988).

Here, however, we cannot "free" Coss because he has already, in the vernacular, "done the crime and done the time." We are thus faced with the very nice question: Should we give society, here, the Commonwealth of Pennsylvania, the right to cure the Sixth Amendment constitutional defect or should we give the Appellant a free ride and have his second sentence declared invalid simply because he is a recidivist?

I think that the state body politic should always have the right to cure the constitutional defect of a conviction used to enhance a sentence on a later conviction (1) if the federal court has the jurisdiction to confer that option upon the state and (2) if it is at all possible by means of new state proceedings. The cases relied upon by the majority to support its grant of extraordinary relief are exceptions to this well-reasoned rule based on the inability of the federal courts to direct new state court proceedings. The circumstances present here fall squarely within our traditional procedures. To follow the course set by the majority, therefore, improperly infringes on state sovereignty and on the notions or federalism, comity and fairness that underlie the habeas corpus framework.

In *Henderson*, *supra*, we explained that "federal habeas power is limited, first, to a determination of whether there has been an improper detention by virtue of the state court judgment; and second, if we find such an illegal detention, to ordering the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings." 155 F.3d at 168.

It must be asked why, in light of our clear discussion in *Henderson*, the majority seeks to deprive the Commonwealth of the option of correcting the constitutional violation by a new trial on simple assault. The majority's primary answer is a reliance on *United States v. Tucker*, 404 U.S. 443 (1972). Let's examine that case.

A.

The teachings of *Tucker* do not constitute an appropriate analogue to this case or any other federal habeas case brought under § 2254. *United States v. Tucker* by caption and by content was not a habeas corpus case brought under § 2254 based on a *state* conviction; the defendant there was seeking post conviction relief from a *federal* conviction pursuant to 28 U.S.C. § 2255. This is a distinction with a fundamental difference. The Court could not possibly condition relief on affording any state the opportunity to retry the defendant because no state officials were parties to the law suit. No state warden, no custodian, no state officers were respondents or defendants as in the case of a § 2254 petition. In bringing his action, Tucker was attacking a federal sentence imposed by the District Court for the Northern District of California that had been enhanced on the basis of invalid state court convictions from Florida and Louisiana. Because the Court had no state officers as petitioners or respondents before it, the Court lacked power or authority to give the option to a state court in Florida or Louisiana to retry the defendant. To prevent the "erosion of the *Gideon* principle" that the right to effective assistance of counsel is fundamental, the Court had no alternative other than to order that the defendant be resentenced on the federal conviction without reference to the invalid state court convictions.[3] In contrast, in every

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3. The Court's discussion is specifically targeted to a § 2255 case:

> [T]he real question here is not whether the results of the Florida and Louisiana proceedings might have been

(Cont'd)

habeas petition brought under § 2254, an officer of the state or a political subdivision thereof is *always* the respondent.

The teachings of *Tucker* reflect one exception to the general rule of permitting the state to correct the constitutional infirmity in a subsequent sentence enhancement case — where the federal court lacks the authority to afford the state the opportunity to correct the constitutional infirmity because no state officer is a party to the litigation. We now turn to another exception reflected in the cases.

B.

This court has held, and properly so, that where it is *factually impossible* for the constitutional infirmity to be cured by additional state proceedings, the federal court in a § 2254 case may simply order resentencing on the subsequent conviction without considering a previous constitutionally infirm conviction. *See Clark v. Commonwealth*, 892 F.2d 1142 (3d Cir. 1989). *Clark* was a deprivation of due process case lodged against a prior conviction that served to enhance the sentence for a subsequent offense. The gravamen of the petitioner's complaint was that in 1974, when Clark was 17 years of age, he was denied a juvenile court hearing to

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(Cont'd)

> different if the respondent had counsel, but *whether the sentence in the 1953 federal case might have been different* if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.

404 U.S. at 448 (emphasis added).

determine whether he should have been tried as a juvenile or as an adult. At the time we heard this appeal in 1989, the petitioner was 31 years old. Accordingly, we could not give the Commonwealth the option of providing Clark a juvenile court hearing. The only relief possible was to order a resentencing on the subsequent conviction without enhancement. Thus, *Clark* reflects at least a second exception to the general rule permitting the state to exercise the option of additional proceedings, to-wit, where it is factually impossible for the state to cure the constitutional defect.

III.

We must then determine what dictates of public policy or social welfare, or what directive force of law — philosophy, history or custom — exists to deny the Commonwealth of Pennsylvania this same option merely because Coss committed another crime and was incarcerated again. To be sure, we have concentrated our federal habeas corpus jurisprudence on the rights of the criminal, but this does not mean that federal judges are at liberty to ignore or totally disregard the rights of society. The great Cardozo taught us:

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "Ethical considerations can no more be excluded from the administration of justice which is the pride and purpose of all civil laws than one can exclude the vital air from his room and live."... [W]hen [judges] are called upon to say how far existing rules are to be

> extended or restricted, they must let the welfare of society fix the path, its direction and its distance.[4]

Drawing the line between individual liberties and rights, and society's rights reflected by government action for the larger good, is still the perpetual question of constitutional law and is the precise issue that faces this panel today. Two thousand years before the Constitution was ratified, the same problem bothered an ancient social order that spoke through Heraclitus: "The major problem of human society is to combine that degree of liberty without which law is tyranny, with that degree of law without which liberty becomes license."[5]

Were we simply deciding a case that involved one young man who had difficulty in the past controlling his urge to punch people and tear out fixtures in a jail cell, and were we to be limited to the facts of this case where, more probably than not, the District Attorney of Lackawanna County likely will not be inclined to commit the resources of his office to retry a simple assault and battery case that occurred thirteen years ago, I do not think that this case would be important at all.

But we must realize that the holding of this case will have a profound effect that far transcends the mundane facts

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4. Benjamin N. Cardozo, *The Nature of the Judicial Process* 66-67 (1921) (footnote omitted).

5. *See* Ruggero J. Aldisert, *The Judicial Process: Text, Materials and Cases* 9 (2d ed. 1996).

before us here and the question of whether we have jurisdiction to consider Coss' appeal in the first place; and that is the whisper of Immanuel Kant behind the ear of every appellate judge reminding us of his famed categorical imperative: "Act as if the maxim of your action were to become through your will a universal law of nature."[6] Two centuries later, an elaboration on the basic theme was uttered: "Judges must decide all the issues in a case on the basis of general principles that have legal relevance; the principles must be ones the judges would be willing to apply to the other situations that they reach; and the opinion justifying the decision should contain a full statement of those principles."[7] This is the concept that undergirds the common law doctrine of precedent: The legal rule announced in a reported case of an appellate court will be applied in subsequent cases presenting the identical facts or materially similar ones.

The majority's holding today is not designed to meet the fugitive exigencies of the hour. Rather, this court is issuing a reward to every recidivist criminal. If you come to federal court during your actual first custody, you will not automatically be set free; the state will be given an opportunity to correct the constitutional infirmity, usually by means of a new trial, some new proceeding or new appeal.

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6. I. Kant, *Groundwork of the Metaphysics of Morals* 89 (Paton trans. 1964) (1785).

7. K. Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982, 990 (1978), *commenting on* H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

But if you wait to file a habeas challenge of the previous conviction until after you commit another criminal act and are sent to jail, the possibilities are so much more palatable, for if you are successful, the body politic does not have the right to correct the original infirmity; automatically, you get the benefit of a resentencing on the second case as if the constitutional infirmity was metaphysically impossible for the state to correct. When you wait until the second offense, Mr. Recidivist Criminal, and the habeas court finds an infirmity in that first conviction, you can thumb your nose to society, "Heads I win, tails you lose." Or in the lingo of the jailhouse lawyers, "Pal, you're gonna get a free pass."

If we are to weigh the various claims, wants and demands asserted on the one hand by the misdemeanant or recidivist and on the other hand by society, the law requires adjustments or compromises of conflicting interests. To do this, we turn to some social interest, frequently under the name of public policy, to determine the limits of reasonable adjustment. We have been taught that a primary social interest is in the general security, long recognized in the maxim that the safety of the people is the highest law. An equally primary social interest is in the life and freedom of the individual. They are on a collision course here, as Heraclitus explained a millennium or two ago, but I feel that if we look at law functionally as an attempt to satisfy, to reconcile, to harmonize, "to adjust these overlapping and often conflicting claims and demands,"[8] the balance must be struck here in favor of the Commonwealth, which should be given the

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8. Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 39 (1943).

opportunity to correct the constitutional infirmity that we have found here.

It is for the foregoing reasons that I dissent in part and would grant the writ of habeas corpus conditioned on the right of the Commonwealth of Pennsylvania to correct the constitutional infirmity by retrying Coss on the 1986 incident.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 30, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7416

EDWARD R. COSS, JR.,

Appellant

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA
(D.C. Civil No. 94-cv-1481)

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, ALDISERT and STAPLETON, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing *en banc* in the above appeal, it is ORDERED that the Clerk of this Court vacate the opinion filed June 28, 1999 and list the above for rehearing *en banc* at the convenience of the Court.

BY THE COURT:

/s/ Edward R. Becker
CHIEF JUDGE

DATED: July 30, 1999

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED JUNE 8, 1998

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**1:CV-94-1481
(Judge Vanaskie)**

EDWARD R. COSS, JR.,

Petitioner

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents

MEMORANDUM

This matter is before the Court on the Second Amended Habeas Corpus Petition of Edward R. Coss, Jr., who alleges violations of his Sixth Amendment right to effective assistance of trial counsel and denial of his Fourteenth Amendment right to due process. In an opinion filed on January 20, 1998, I held that Coss's allegation that he received ineffective assistance of trial counsel in October of 1986 was sufficiently meritorious to require an evidentiary hearing to more completely develop a record. An evidentiary

hearing was held on April 20, 1998. Having completed the evidentiary hearing, this matter is now ripe for disposition.

The evidence presented at the hearing makes clear that the assistance rendered by counsel appointed to represent Coss in his October 1986 trial fell below an objective standard of reasonableness. Particularly, her failure to subpoena or even speak to witnesses who had been at the scene of the incident where Coss was arrested, and her failure to point out that the Commonwealth had not presented evidence on an essential element of the criminal mischief charge, either in her motion for demurrer or via a post-trial motion, compel this conclusion. However, Coss has failed to show that there is a reasonable probability that, but for counsel's error, the result would have been different. As a result, habeas corpus relief will be denied.

I. FINDINGS OF FACT

1. The petitioner in this case is Edward (Eddie) R. Coss, Jr. (Petition for Writ of Habeas Corpus (Dkt. Entry 1).)

2. On June 25, 1986, Eddie Coss, who was then 17 years old, attended a graduation/birthday party at the residence of his sister, Carol Ann Frank, at the rear of 600 Main Street in Dickson City. (Evid. Hr'g Tr. (Dkt. Entry 98) at 19-20.)

3. Eddie Coss drove to his sister's home and was accompanied by his girlfriend, Sherry Kulick, and his brothers, Robert (Bobby) Helring and James (Jimmy) Coss. (*Id.* at 45, 55, 74.)

4. When they arrived at the party several individuals were already there, including Carol Ann Frank, Lisa Frieto (Carol Ann's roommate), and Lisa's brother, George Frieto.

5. During the course of the party, an argument broke out between Lisa Frieto and Sherry Kulick. (*Id.* at 22, 75, 83.) Soon thereafter arguments started erupting between other guests. (*Id.* at 23, 75, 83, 97.) It should be added that most of the guests had consumed alcohol. (*Id.* at 27, 48, 52-53.)

6. As a result, Carol Ann Frank threw everybody out of her home. (*Id.* at 23, 57, 75.)

7. Outside, the arguments continued, including one between Jimmy, who was holding a baseball bat, and Eddie. (*Id.* at 24, 58, 66-67.) George Frieto attempted to break up the dispute between the two brothers. (*Id.*)

8. In the meantime, Carol Ann's landlord was yelling out the window that if everyone did not disperse she would call the police. (*Id.*)

9. Eventually, police officers from the Dickson City Police Department arrived at the scene. (*Id.*) Eddie Coss was arrested for disorderly conduct and taken to police headquarters. (*Id.* at 27, 62, 77.)

10. That night, Eddie Coss was placed in the Lackawanna County Detention Facility at 313

Monroe Avenue, Scranton, Pa. for underage drinking. (*Id.* at 120.)

11. Eddie Coss damaged the cell in which he was staying, destroying a radiator, a sink, a toilet and a light fixture on the ceiling in the cell. (Oct. 1986 Trial Tr. at 113.)

12. Eddie Coss was charged with institutional vandalism, criminal mischief, criminal trespass, simple assault, theft by unlawful taking or disposition, aggravated assault, resisting arrest, terroristic threats, and disorderly conduct. (Mem. & Ct. Order (Dkt. Entry 87) at 3.)

13. On July 29, 1986, Eddie Coss was released on bail. (Evid. Hr'g Tr. (Dkt. Entry 98) at 121.) The conditions of Eddie's bail required him to live with his biological father at 312 New Street, Scranton; not leave Lackawanna County; refrain from consuming alcohol or drugs; refrain from violating any laws; and contact a probation officer every Friday by noon. (*Id.* at 123, 128); (*see also* July 29, 1986 Bail Order.)

14. Eddie Coss was enrolled at West Scranton High School at the time, yet he could not continue to attend that school while living at his biological father's address. (*Id.* at 124.) Instead, Eddie Coss moved into his step-father's residence in West Scranton. (*Id.* at 125, 133-134.)

15. RoseAnn McGowan began working as an assistant public defender for the Lackawanna County Public Defenders Office in July of 1985. (*Id.* at 139.) At the time of Coss's trial, McGowan had fifteen months of experience. (*Id.* at 140.)

16. Robert Helring, Coss's step-father from a previous marriage, met with McGowan to discuss whether Coss should be tried as an adult. (*Id.* at 14-15.)

17. On July 3, 1986, Coss was certified to be prosecuted as an adult.

18. McGowan met with Coss for the first time the first week of August at her office. At that meeting, McGowan was given the names and addresses of several potential witnesses. (*Id.*)

19. The second meeting between Coss and McGowan occurred after a severance motion was filed in September of 1986. This motion requested that the charges against Coss in Dickson City be severed from those filed against him for the damage to the juvenile detention center. (*Id.* at 104, 118.) The motion was denied.

20. After several postponements, Coss's trial began on October 30, 1986. (*Id.* at 13.)

21. Coss never received notice of this trial date. (*Id.* at 105.) McGowan averred that a notice would have been sent to the address where Coss was supposed to be residing as set forth as a condition of bail.

22. Mr. Leo Harding is a part-time investigator with the Lackawanna County Public Defender's office. (*Id.* at 35.)

23. On the night of October 29, 1986, Harding posted a notice regarding Coss's trial date at 312 New Street, the address of Coss's biological father.

24. On October 30, 1986, Harding went to 312 New Street. Harding was notified that Coss was staying at 907 Alders Street, with Robert Helring and Donna Helring, Robert's wife. Harding then went to the Alders street address. (*Id.* at 10.)

25. Neither Robert Helring nor Eddie Coss were home when Harding arrived. (*Id.* at 8.) Harding spoke with Donna Helring and told her that Eddie had to be in court within an hour. (*Id.*)

26. Robert Helring came home and Donna Heiring repeated what Harding had told her. (*Id.*) Robert went looking for Eddie and finally found him at a grocery store. (*Id.* at 106.)

27. Once Eddie was told to go to the courthouse by Robert Helring, he immediately drove there, stopping only at West Scranton High School to pick up his brother, Jimmy Coss, who was sixteen (16) and in the 10th grade. (*Id.* at 16-17, 39.)

28. Based on several motions filed by McGowan, the charges which were ultimately presented to the jury

were institutional vandalism and criminal mischief; simple assault, resisting arrest; and disorderly conduct.

29. The trial lasted two days. (*Id.* at 41, 110.)

30. Two of the officers who testified against Coss, Officers Adamitis and Wrobel, stated that when they arrived individuals began scattering. (*See* Oct. 1986 Trial Tr., Testimony of Officers Anthony Adamitis and Andrew Wrobel.)

31. The officers also stated that Eddie ran to his car and that when Officer Wrobel grabbed him he noticed that Eddie, who was screaming vulgarities, smelled of alcohol. Eddie began pushing Officer Wrobel and Eddie was then arrested. Additionally, as officer Adamitis attempted to grab Eddie's brother, Bobby, Eddie punched him in the face. (*Id.*)

32. Officer Wrobel added that there was another individual named George hindering their abilities to arrest Bobby. (*Id.* at 38.)

33. At the October 1986 trial, Eddie Coss testified that he, Jimmy, and Bobby were in their sister's driveway on the fender of Eddie's car visiting their sister. (*Id.* at 80-82.)

34. Eddie stated he and his brothers were there no more than fifteen minutes when two police officers arrived and began to physically assault Bobby and Eddie.

(*Id.* at 81-83.) Eddie asserted that he did not curse or throw a punch at anyone.

35. Eddie also stated that neither he nor Bobby had been drinking that night. (*Id.* at 85-87.)

36. Eddie also testified that he did not know who the officer was referring to when he stated that there was another individual named George at the scene. (*Id.* at 102.)

37. The only other witness who testified on Eddie's behalf at the 1986 trial was Jimmy Coss.

38. Jimmy Coss stated that he, along with Eddie and Bobby, had gone to his sisters' home to give her a camera, and were sitting in the driveway waiting for their sister to return the camera when the officers came. *Id.* at 116-117.

39. Jimmy testified that he had not been drinking that night and that Eddie never hit an officer in Carol Ann's driveway. *Id.* at 120-121.

40. Neither Donna Helring, Robert Helring, Carol Ann Frank, Bobby Helring, Sherry Kulick or George Frieto testified on behalf of Eddie Coss at his trial.

41. These individuals did all testify at the evidentiary hearing held in April 1998. (Evid. Hr'g Tr. (Dkt. Entry 98).)

42. At the hearing, all the individuals that were present when Coss was arrested testified that he did not strike any police officer. (*Id.* at 28[Carol Ann Frank]; 68[Bobby Helring]; 80[Sherry Kulick]; and 92[George Frieto].)

43. Several individuals at the hearing also testified that it was George Frieto who jumped on an officer's back to prevent Bobby Helring from being assaulted. (*Id.* at 60[Bobby Helring]; 79[Sherry Kulick]; and 90[George Frieto].)

44. McGowan never interviewed any of these individuals or Jimmy Coss.

45. On October 31, 1986, Coss was convicted of institutional vandalism, criminal mischief and simple assault. Coss was not convicted of resisting arrest or disorderly conduct. (Mem. & Ct. Order (Dkt. Entry 87) at 4.)

46. Coss told McGowan that he wanted to file post-trial motions, as well as appeal several issues. (Evid. Hr'g Tr. (Dkt. Entry 98) at 113-115.) McGowan told Coss she would file post-trial motions before she went on vacation. McGowan never filed these motions. (*Id.*)

47. Coss was sentenced on January 30, 1987. He received six (6) months to one (1) year on the simple assault charge and six (6) months to (1) year on the institutional vandalism charge. (Jan. 1987 Sentencing

Proceeding at 9.) For sentencing purposes the criminal mischief charge was merged into the institutional vandalism charge. (*Id.*) The simple assault and institutional vandalism/criminal mischief sentences were to run consecutively. (*Id.*) Coss was also ordered to pay court costs. (*Id.*)

48. On February 3, 1987, McGowan filed a Petition for Reconsideration of Sentence, which was denied.

II. SUBSEQUENT PROCEDURAL HISTORY

1. On September 15, 1994, Coss filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. Entry 1.)

2. Prior to filing his § 2254 petition, Coss had a petition under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. § 9541, *et seq.*, pending in state court for about seven years without any activity. (Mem. & Ct. Order (Dkt. Entry 87) at 5 n.5.) Under these circumstances, exhaustion of state remedies was excused. *See Hankins v. Fulcomer*, 941 F.2d 246 (3d Cir. 1991) (exhaustion excused based on inordinate delay).

3. An Amended Petition (Dkt. Entry 44) was filed by Coss on November 29, 1995, and a Second Petition for Writ of Habeas Corpus was filed on November 7, 1996. (Dkt. Entry 72.)

4. On April 10, 1997, Magistrate Judge Blewitt submitted a Report and Recommendation suggesting

that Coss's petition be denied for lack of merit. (Dkt. Entry 79.)

5. On May 8, 1997, Coss filed his objections to the Report and Recommendation. (Dkt. Entry 82.)

6. On June 16, 1997, the matter was transferred by Judge Caldwell to the Scranton Division for consideration of the Magistrate Judge's Report and Recommendation. (Dkt. Entry 84.)

7. By Memorandum and Order dated January 20, 1998, Coss's objections to the Report and Recommendation of the Magistrate Judge pertaining to ineffective assistance of counsel were sustained.

8. On April 20, 1998, an evidentiary hearing was held to address the ineffective assistance of counsel claims raised by Coss.

III. CONCLUSIONS OF LAW

A. Jurisdiction

At the outset, a brief explanation is required as to how this Court has jurisdiction to entertain Coss's challenge to his 1986 convictions. Coss has already served his sentence for his 1986 convictions of simple assault and institutional vandalism. Presently, he is serving a sentence based on charges unrelated to the 1986 convictions. However, Coss maintains that his current sentence was adversely affected by the 1986 convictions because the sentencing judge

considered these allegedly unconstitutional convictions in computing Coss's present sentence.

In *United States v. Tucker*, 404 U.S. 443, 447 (1972), the Supreme Court held that a prisoner could attack an allegedly unconstitutional conviction in an attempt to have his current sentence re-evaluated because the judge had relied on a prior unconstitutional conviction in imposing the present sentence. In *Tucker*, three felonies were introduced as evidence in a 1953 trial against Forrest S. Tucker. Tucker was found guilty. During the sentencing proceeding, the district judge gave explicit attention to the three prior felony convictions. Tucker was given 25 years, the maximum term authorized. Years later it was determined that the first two felonies were unconstitutionally obtained. Tucker successfully challenged his sentence. The Supreme Court held that Tucker had to be resentenced:

> [I]f the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who, beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang.

Id. at 597.

Relying on *Tucker*, the Third Circuit in *Clark v. Commonwealth of Pa.*, 892 F.2d 1142 (1989), *cert. denied*, *Castille v. Clark*, 496 U.S. 942 (1990) held that it had jurisdiction to review a prisoner's allegedly unconstitutional convictions, the sentences of which had already been completed, in an attempt to determine whether the prisoner's current sentence had to be re-evaluated because the sentencing judge had relied on the prior convictions in imposing the present sentence. Specifically, the court held, "[t]he reviewability of those convictions nonetheless remains before us [ ] because of their collateral enhancement consequences on the 1980 sentence." *Id.* at 1145. In *Clark*, the court remanded the case for resentencing, acknowledging that it was "the only relief permitted under *Tucker*." *Id.* at 1149.

In addition to *Tucker* and *Clark*, more recent support for permitting Coss to challenge his 1986 convictions can be garnered from *Young v. Vaughn*, 83 F.3d 72 (3d Cir.), *cert. denied*, *Abraham v. Young*, 117 S. Ct. 333 (1996). That court stated in no uncertain terms that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence." *Id.* at 78.

In this case, Coss's 1986 convictions did not affect his criminal history rating under the Pennsylvania sentencing guidelines for his 1990 aggravated assault conviction. *See Commonwealth v. Coss*, 695 A.2d 831 (Pa. Super. 1997). The sentencing judge, however, did make reference to the 1986 convictions in sentencing Coss to the top of the standard range for his 1990 aggravated assault conviction — 6 to 12

years. Under the applicable precedents, Coss is therefore entitled to challenge the validity of his current sentence by attacking the 1986 convictions.[1]

B. Standard for Ineffective Assistance of Counsel

A "criminal defendant is entitled to reasonably effective assistance of counsel." *Myers v. Gillis*, No 97-CV-1750, 1998 WL 199726, *3 (3d Cir. April 27, 1998). However, before habeas relief may be granted, defendant must show not only that he was provided with ineffective assistance of counsel, but that such deficient performance resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, a two-pronged test must be met in order to establish ineffective assistance of counsel: (i) counsel's representation must be shown to have fallen below an objective standard of reasonableness; and (ii) there is a reasonable probability that, but for counsel's error, the result would have been different. *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) (*quoting United States v. Nino*, 878 F.2d 101, 103 (3d Cir. 1989)). A reasonable probability is defined as one which is "sufficient to undermine confidence in the outcome." *Id.* (*quoting Strickland*, 466 U.S. at 694).

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1. As explained in footnote five (5) in my January 20, 1998 opinion, the Pennsylvania courts would not now entertain a challenge to Coss's 1990 sentence based upon the alleged invalidity of his 1986 convictions so there are no available state court remedies to exhaust.

C. Empaneling of Two Jurors Adverse to Coss's Interests

The first issue raised by Coss is that his attorney allowed two individuals adverse to his interests to be selected as jurors. Coss asserts that McGowan began jury selection without him and that she failed to heed his warning that Mr. Kobeski and Mr. Strelecki would be prejudiced against him. McGowan testified that she was absolutely certain that Coss was present when the trial commenced. (*Id.* at 140.) Specifically, McGowan testified that never in her entire career as an assistant public defender had she conducted a trial without the defendant being present and that the court would not have called in a panel without Coss being there. (*Id.*) Furthermore, the testimony of Jimmy Coss cannot be accepted on this issue because he stated that when he and Eddie arrived an individual was already on the witness stand. (Evid. Hr'g Tr. (Dkt. Entry 98) at 40.) If accepted as true, then Eddie would have missed jury selection altogether, and his argument that he told McGowan not to select certain jurors would seem to have been a fabrication. Thus, on this issue, I find the testimony of McGowan to be more credible than that of Eddie Coss or Jimmy Coss. It is likely that Eddie Coss was late to his trial, but based on the testimony of McGowan I find that the proceedings had not yet begun when Eddie Coss arrived at the courthouse.

As a result, I find that Coss was present during jury selection. Furthermore, I do not find to be credible Coss's testimony that he told McGowan not to select Mr. Kobeski and Mr. Strelecki. It simply does not make sense for McGowan not to listen to such advice. Rather, McGowan's

testimony that she and Coss never discussed these two jurors during jury selection seems more truthful. (*Id.* at 140.) McGowan stated that long after the trial had concluded Coss for the first time informed her that two jurors should not have been on the jury. (*Id.* at 141.) McGowan testified, "[m]y impression, at the time, was that Mr. Coss did not know who those jurors were, when we sat there in the courtroom, but was later advised by either his family member or whoever knew them, that they did know them." (*Id.*)

Additionally, even if it is believed that Coss did tell McGowan not to select Mr. Kobeski and Mr. Strelecki and she ignored him, Coss would have only shown that his counsel's representation fell below an objective standard of reasonableness. Coss would still have to show that there is a reasonable probability that, but for counsel's error, the result would have been different. Coss has failed to show prejudice. As previously stated, Coss faced charges of institutional vandalism, criminal mischief, disorderly conduct, simple assault and resisting arrest. The jury acquitted Coss of disorderly conduct and resisting arrest. If Mr. Kobeski and Mr. Strelecki were so bent on nailing Coss, it does not seem likely they would have voted to acquit Coss on any of the charges. The fact that they did acquit Coss of those charges further erodes Coss's argument that these two jurors had a personal vendetta against him.

In sum, since I believe jury selection had not commenced prior to Coss's arrival, since I do not find that Coss objected to the selection of Mr. Kobeski and Mr. Strelecki as jurors, and since I find that Coss has not demonstrated any prejudice based on the these two men having served as jurors, Coss's

claim that McGowan provided ineffective assistance of counsel because she allowed Mr. Kobeski and Mr. Strelecki to serve as jurors during Coss's trial must be denied.

D. Failure to Subpoena Witnesses on the Assault Charges

Coss also argues that trial counsel failed to subpoena any of the witnesses he had requested. Counsel's strategic trial decisions are accorded great deference. *Hess v. Mazurkiewicz*, 135 F.3d 905 (3d Cir. 1998). However, " 'failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness.' While counsel is entitled to substantial deference with respect to strategic judgment, an attorney must investigate a case, when he[/she] has cause to do so, in order to provide minimally competent professional representation." *Kauffman*, 109 F.3d at 190 (*quoting United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989)).

During the course of the evidentiary hearing, witness after witness stated that they had not been contacted by anyone regarding Coss's case. Carol Ann Frank, Jimmy Coss, Bobby Helring, Sherry Kulick and George Frieto, all eyewitnesses to the events of June 25, 1986, specifically testified that they had never discussed the case with McGowan or any private investigator working on her behalf. (Evid. Hr'g Tr. (Dkt. Entry 98) at 21[Carol Ann Frank]; 42[Jimmy Coss]; 56[Bobby Helring]; 81[Sherry Kulick]; and 93[George Frieto].) These individuals also stated that Eddie did not attack an officer. (*Id.* at 28[Carol Ann Frank]; 68[Bobby Helring]; 80[Sherry Kulick]; and 92[George

Frieto].) Moreover, several of these individuals, including George Frieto, alleged that it was George Frieto who struck the officer because Bobby Helring was being allegedly beaten. (*Id.* at 60[Bobby Helring]; 79[Sherry Kulick]; and 90[George Frieto].) Coss asserted that he provided the names of these individuals to his attorney when she interviewed him in August of 1986. Even if the names had not been communicated by Coss, a cursory review of the police reports would have identified the names and addresses of some of these witnesses.

Nonetheless, McGowan elected not to subpoena any witnesses, even after the officers testified and stated the names of several witnesses at the scene (i.e. Jimmy Coss, Bobby Helring, Carol Ann Frank (her residence), a George (George Frieto), a pregnant woman at the scene (obviously Sherry Kulick)). In fact, the only witnesses who testified on behalf of Eddie Coss were Eddie and his 16 year-old brother Jimmy, whom Eddie brought to the proceeding on his own initiative. McGowan admitted on cross-examination that she had not met with Jimmy to go over his testimony. (*Id.* at 165-169; *see also* Jimmy Coss's Testimony, *id.* at 42.)

McGowan's recollection of the case was somewhat sketchy. She conceded that she did not conduct an independent investigation, admitting that she elected not to dispatch her investigator to interview these individuals. (*Id.* at 165-172.) McGowan defended her actions of not investigating these witnesses by stating that Coss must have told her not to subpoena them. (*Id.*) Even if Coss had told McGowan not to subpoena any witnesses, her professional judgment as an attorney should have prevailed over that of a

seventeen (17) year-old defendant. In short, McGowan performed *no* investigation and did not exercise any professional judgment insofar as trial strategy was concerned. Her performance thus fell below an objective standard of reasonableness.

Again, however, Coss must also show that he was prejudiced by McGowan's ineffective assistance. He has not met this burden. In *Hess*, *supra*, the court held that in order to meet this element defendant had to "demonstrate a reasonable probability that, but for counsel's errors, the trial's outcome would have been different." 135 F.3d at 909. As earlier stated, a reasonable probability is a probability sufficient to undermine confidence in the outcome.

Coss states he was prejudiced because other witnesses were available that were not subpoenaed. Based on the evidentiary hearing, other witnesses were available that could have corroborated Coss's allegation that he did not hit a police officer. These other witnesses, however, gave testimony that was diametrically opposed to the trial testimony of Coss and his brother Jimmy.

Before pointing out the inconsistencies, it should be noted that the testimony of Carol Ann Frank and Bobby Helring would have been suspect because they were Coss's siblings. Additionally, the testimony of Sherry Kulick would also have been impeachable on the ground that she was Eddie's girlfriend and Eddie was the father of their then recently born daughter. In any event, the evidentiary hearing accounts of what transpired on that night in June of 1986 are so divergent from the trial testimony that they sound like two completely different events.

Appendix D

The testimony of Jimmy and Eddie at the 1986 trial was that they were not at a party, had not been drinking, and were merely waiting for their sister to give them a camera when two officers, unprovoked, attacked them for no reason. The testimony at the evidentiary hearing makes clear that all three brothers were at a party, and that Sherry Kulick had gone to the party with them. Additionally, the witnesses at the evidentiary hearing consistently testified that all three brothers had been drinking, in complete contrast to the trial testimony of Jimmy and Eddie Coss. All the individuals who testified at the evidentiary hearing also noted that an argument broke out between Sherry Kulick and Lisa Frieto, resulting in Carol Ann evicting all the guests from her house and culminating in an argument between Eddie and Jimmy Coss. The witnesses further testified that many of the guests were arguing, causing a ruckus in the yard and driveway. The commotion was so loud that Carol Ann's landlord threatened to call the police. This scene is quite different from the one portrayed by Eddie and Jimmy Coss at the 1986 trial — a calm and tranquil scene disrupted by two rogue cops.

The testimony of George Frieto, at first glance, seems quite helpful for Coss since he admits to jumping on the back of a police officer. However, George Frieto's testimony is consistent with that of the officers, who unlike Eddie and Jimmy, stated there was an individual named George at the scene of the assault who was attempting to frustrate their arrest of Bobby Coss. Thus, Frieto's testimony is not completely inconsistent with that of the officers. Moreover, Frieto's testimony is inconsistent with the trial testimony of Eddie Coss, who stated he did not know who the officers

Appendix D

were referring to when they stated there was an individual named George present at the scene. Specifically, in reference to the officer's testimony, Coss stated, "he said there was a third person, George, and I don't even know what he's talking about .... There was me, Jimmy and Bobby, and he [the Officer] came up with the name George." (Oct. 1986 Trial Tr. at 102.)

"Prejudice" to a defendant from the failure to call witnesses should be assessed in the context of the other testimony presented by the defense witnesses. Otherwise, a defendant whose story was not believed by the jury could fault defense counsel for not presenting a different version of events. Essentially, Eddie Coss wants to change the story presented to the jury by him and Jimmy. Coss wants to blame his counsel for not calling witnesses who would have contradicted his testimony in many significant respects.[2] Having given one sworn version of the events in question, a habeas petitioner should not be permitted to contest the reliability of the verdict on the basis of an inconsistent account by other witnesses. When considered in the context of Eddie and Jimmy's trial account, the testimony presented by the evidentiary hearing witnesses does not undermine confidence in the jury's verdict. The jury was called upon to make a credibility determination — whether to believe the

2. The story told the jury by Eddie and Jimmy Coss lends credence to Atty. McGowan's testimony that Eddie Coss did not want her to call other witnesses to testify. Their testimony would have implicated them in an illegal underage drinking party, as well as implicated George Frieto in the assault of a police officer. It is likely that Eddie Coss did not want to place his family members and friends in such jeopardy.

Coss brothers or the police officers. Had information that all three brothers were drinking and that Jimmy and Eddie Coss had come close to blows been introduced at the trial, it would have completely contradicted Eddie Coss's version of the facts. Additionally, the fact that these young brothers had been drinking a large amount of alcohol and were obviously in an agitated state would have provided another basis for disbelieving the Coss brothers. Under these circumstances, the evidence presented in this matter does not establish a reasonable probability that the outcome of the case would have been different if Coss's family members and the Frietos had testified.

In short, the testimony presented at the evidentiary hearing will not be allowed to undermine confidence in the jury's determination that Coss was guilty of simple assault. Since Coss has failed to show prejudice, this claim must be denied.

E. Failure to Have the Institutional Vandalism and Criminal Mischief Charges Dismissed.

Next, Coss argues that McGowan provided ineffective assistance of counsel when she failed to raise the issue that the Commonwealth had not met all the elements necessary to convict Coss of institutional vandalism and criminal mischief. According to the criminal complaint, the District Attorney of Lackawanna County charged Coss under 18 Pa.C.S. §§ 3307(a)(3) (Institutional Vandalism) and 3304(2) (Criminal Mischief). Specifically, Coss was charged with committing the offense of institutional vandalism by knowingly damaging a juvenile detention center and with

committing the offense of criminal mischief by intentionally or recklessly tampering with tangible property of another so as to endanger person or property. The complaint also stated that, as to both charges, Coss had caused pecuniary losses in excess of $1,000.

At Coss's trial, the Assistant District Attorney had four witnesses testify that Coss had destroyed his cell at the juvenile detention center: Officers Anthony Adamitis and Andrew T. Wrobel; Chief Probation Officer and Superintendent of the Lackawanna Detention Center, Anthony P. Gach; and Child Care Worker, Father Nestor Kowal. These individuals testified that Coss destroyed a radiator, sink, toilet and light fixture. (Oct. 1986 Trial Tr. at 113.) None of these four witnesses, however, provided any evidence as to the dollar value of the damage done to the juvenile detention center.

Coss correctly argues that since he was charged with a second degree misdemeanor on the criminal mischief charge, (the criminal Information indicated Coss was charged with an "M-2" and that he had caused damage in excess of $1,000), it was incumbent upon the Commonwealth to prove economic loss of more than $1,000 beyond a reasonable doubt. Coss stated that no evidence was presented establishing an economic value on the damaged property. As a result, the district attorney did not meet all of the elements necessary to convict Coss of second degree misdemeanor criminal mischief. McGowan's failure to raise this point indicates that her representation fell below an objective standard of reasonableness.

However, Coss incorrectly argues that the same analysis applies to the institutional vandalism charge. Section 3307(b) provides that institutional vandalism is a misdemeanor of the second degree when the damages are $5,000 *or less*. In terms of this charge, Coss was charged with a misdemeanor of the second degree, as a result it was not necessary to establish an economic value for the damaged property. The government would only have had to establish a pecuniary loss if the offense had been graded as felony of the third degree. In that case, the Commonwealth would have had to show a pecuniary loss in excess of $5,000. (*Id.*)

More importantly, when Coss was sentence he did not receive a sentence on the criminal mischief charge. The sentencing judge noted that the criminal mischief sentence was merged into the institutional vandalism sentence. The sentencing transcript makes clear that "no additional sentence [was] imposed on [the] criminal mischief [charge]." (Jan. 1987 Sentencing Proceeding at 9.) The uncontradicted evidence showed that Coss committed institutional vandalism. Without proof of damages exceeding $5,000, this crime is a misdemeanor of the second degree, and Coss was sentenced within the range of a second degree misdemeanor.[3] As a result, Coss is not entitled to prevail on his claim that McGowan rendered ineffective assistance when she failed to raise the issue that the prosecution had not met an element of the criminal mischief charge.

---

3. A second degree misdemeanor is subject to imprisonment of not more than two years. 18 Pa.C.S. § 106(b)(7).

F. Failure to File Post-Trial Motions

Finally, Coss has asserted that McGowan provided ineffective assistance of counsel because she did not file post-trial motions on his behalf. Coss stated that he specifically asked McGowan to file post-trial motions with the trial court. Coss further alleged that McGowan said she would file these motions before she went on vacation to Lake Ariel. McGowan responded to this claim by stating that she did not file post-trial motions because Coss told her not to. McGowan alleged that Coss wanted to be sentenced as early as possible to avoid sitting in jail. Coss, however, was free on bail pending sentencing. When McGowan was informed that Coss was not in jail, but out on bail during that time-period, (*see* Oct. 1986 Trial Tr. at 148), she could not provide a reason for why Coss would want to forego the filing of post-trial motions, except that perhaps someone told him he was better off not filing such motions.

Coss, however, has not demonstrated that there is a reasonable probability that, but for counsel's error, the result would have been different. As previously stated, McGowan's failure to raise the issue that the prosecution had not established an element of the criminal mischief claim did not prejudice Coss. Thus, McGowan's failure to raise this issue on a post-trial motion did not prejudice Coss. The only other issue which Coss noted might have been appropriately raised in a post-trial motion was the inconsistency of being found guilty of simple assault and not guilty of resisting arrest. Since there is nothing inherently inconsistent in these verdicts, this post-trial motion would have been meritless. As Judge Cottone stated at the January 1987 sentencing

hearing, "it's not inconsistent that you be convicted on simple assault and still you didn't have to be guilty of resisting arrest." (Jan. 1987 Sentencing Proceeding at 5.) In fact, the record suggests that, if the testimony of the officers were accepted, Coss could be guilty of simple assault and not resisting arrest since Coss punched the officer after he had been arrested. Thus, the testimony indicates that Coss did not punch the officer to avoid being arrested, but in order to protect his brother Bobby. As a result, McGowan's failure to file post-trial motions on behalf of Coss did not constitute ineffective assistance of counsel.

III. CONCLUSION

For all the foregoing reasons, Coss's Second Petition for Writ of Habeas Corpus be denied. An appropriate order is attached.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

1:CV-94-1481
(Judge Vanaskie)

EDWARD R. COSS, JR.,

Petitioner

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents

ORDER

June 8, 1998

NOW, therefore, in accordance with the attached Memorandum, it is hereby **ORDERED THAT**:

1. Coss's Second Petition for Writ of Habeas Corpus (Dkt. Entry 72) is **DENIED**.

2. The Clerk of Court is directed to mark this case **CLOSED**.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

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(2)

No. 99-1884

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Petitioners

v.

EDWARD R. COSS, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES V. WADE, ESQUIRE
Federal Public Defender for the
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Counsel for Respondent,
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10 pp

QUESTION PRESENTED

DOES THE CUSTODY REQUIREMENT OF THE FEDERAL HABEAS CORPUS STATUTE PRECLUDE, UNDER ALL CIRCUMSTANCES, A CHALLENGE UPON A FULLY EXPIRED CONVICTION THAT WAS USED TO ENHANCE A CURRENT CONVICTION UNDER HABEAS ATTACK AND FOR WHICH THE PETITIONER IS PRESENTLY IN CUSTODY?

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STATEMENT OF THE CASE

By published *en banc* decision filed February 29, 2000, the United States Court of Appeals for the Third Circuit granted conditional relief under 28 U.S.C. §2254 to respondent Edward R. Coss, Jr., an individual presently serving a sentence of incarceration in the Pennsylvania prison system. Coss v. Lackawanna County District Attorney, 204 F.3d 453 (3rd Cir. 2000) (*en banc*). The Court of Appeals found that in imposing the sentence currently being served, the state sentencing court had taken into consideration a prior Pennsylvania conviction for simple assault, a conviction alleged by the defendant to have been unconstitutionally secured. Id. at 459. Upon review of the evidence presented to the district court, the Third Circuit found that the prior conviction for simple assault had indeed been obtained in violation of the defendant's Sixth Amendment right to effective assistance of counsel. Id. at 461-464. Based upon this finding of ineffective assistance, plus a finding that the current sentence had been influenced by the tainted conviction, the Third Circuit issued a conditional writ of habeas corpus. Id. at 459, 467. The Commonwealth now seeks a writ of certiorari, arguing that there is a split among the circuits regarding the proper resolution of a relevant question left open by this Court in Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732 (1994) (Petition for Writ of Certiorari at 7-9).

REASONS FOR DENYING THE WRIT

BECAUSE OF AN UNUSUAL PROCEDURAL CIRCUMSTANCE, TO-WIT, A BREAKDOWN IN THE PENNSYLVANIA POST-CONVICTION PROCESS, THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION LEFT OPEN IN CUSTIS V. UNITED STATES.

In Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732 (1994), this Court held that, with the exception of Gideon challenges, defendants at federal sentencing hearings were precluded from attacking the constitutional validity of prior state convictions used to enhance the federal sentence. While emphasizing that the federal sentencing hearing was not a proper forum to challenge the constitutionality of prior convictions, this Court noted that the defendant was free to return to state court, where he could pursue his challenge to the constitutionality of the prior convictions; if the defendant was successful in challenging the prior convictions, he could then apply to re-open the federal sentence. Id., 511 U.S. at 497, 114 S.Ct. at 1739. Although this Court expressed no opinion on the appropriate disposition of such an application, Id., the circuit courts are in agreement that where a defendant is successful in overturning his prior state court convictions, the federal district court has the authority to reconsider any

federal sentence which was enhanced by those convictions. See Ryan v. United States, __ F.3d __, 2000 WL 715005, *4 and *8 (7th Cir., June 5, 2000) (collecting cases).

The circuit courts are not in agreement, however, regarding how to treat the case where a prisoner, state or federal, challenges the sentence currently being served without first having attempted to challenge his prior convictions through available state court post-conviction remedies. This question was recently addressed by the Seventh Circuit in Ryan v. United States, __ F.3d __, 2000 WL 715005 (7th Cir., June 5, 2000). In the majority opinion written by Judge Easterbrook, the Seventh Court held that the prisoner could not collaterally attack his prior state court conviction where he had failed to take advantage of available state court post-conviction remedies. A dissenting opinion in Ryan, written by Judge Wood, criticizes the approach taken by Judge Easterbrook as a departure from settled case law.

The instant case is not a proper vehicle for resolving the dispute reflected by Ryan. This is because of a critical difference between the fact pattern in Ryan and the fact pattern in the instant case. Ryan dealt with a prisoner who had failed to

make any attempt to challenge his prior conviction through available state post-conviction procedures. In the instant case, by contrast, defendant Coss made a timely attempt to challenge his prior conviction, but was thwarted by a breakdown in the state court post-conviction process.

The record reflects that seven years prior to the filing of his federal petition for post-conviction relief, Mr. Coss filed a state post-conviction petition attacking the prior conviction for simple assault. Coss v. Lackawanna County District Attorney, supra, 204 F.3d at 460. The record further reflects that the Court of Common Pleas of Lackawanna County failed to take any action on his petition. Id. Given that Mr. Coss's attempt to exhaust his state court remedies was ignored by the state court for seven years, the Third Circuit held that the exhaustion requirement had properly been excused by the district court. Id.

The breakdown in the Pennsylvania post-conviction process, and the resulting frustration of the prisoner's attempt to exhaust his state court remedies, make this case a poor vehicle for resolving the issue debated by the majority and the dissent in Ryan v. United States. The seven years of state court inaction is an unusual factual circumstance which would limit the precedential utility of any

Supreme Court decision. Additionally, the decision in Ryan is less than one month old, and has yet to percolate through the federal courts. For these reasons, the Court should await a case which more closely matches the fact pattern presented in Ryan.

CONCLUSION

WHEREFORE, it is respectfully requested that the Commonwealth's petition for writ of certiorari be denied.

Respectfully submitted,

Date: June 23, 2000

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CERTIFICATE OF BAR MEMBERSHIP

I, Daniel I. Siegel, of the Federal Public Defender's Office, hereby certify that I am a member of the Bar of this Court.

Respectfully submitted,

DANIEL I. SIEGEL, ESQUIRE
Assistant Federal Public Defender

(7)

Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

No. 99-1884

IN THE

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

EDWARD R. COSS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 24, 2000
CERTIORARI GRANTED OCTOBER 10, 2000

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The following opinions, findings of fact, conclusions of law, orders and memorandum have been omitted in printing this joint appendix because they appear in the appendix of the Petition for a Writ of Certiorari on the following pages:

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APPENDIX A — DISTRICT COURT DOCKET ENTRIES

U.S. District Court
Middle District of Pennsylvania (Harrisburg)

CIVIL DOCKET FOR CASE #: 94-CV-1481

Coss v. Lackawanna County District Attorney, et al

* * *

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/15/94	1	PETITION FOR WRIT OF HABEAS CORPUS Amt: IFP Pending (ps) [Entry date 09/19/94]
9/15/94	2	MOTION by petitioner Edward D. Coss Jr. to proceed in forma pauperis (ps) [Entry date 09/19/94]
9/15/94	3	Brief by petitioner Edward D. Coss Jr. in support of Writ of Habeas Corpus Federal Rule 2254 (ps) [Entry date 09/19/94]
9/19/94	4	MOTION by petitioner Edward D. Coss Jr. to amend Habeas Corpus Federal Rule 2254 (Relief Sought), and for appointment of counsel w/ prop. ord. (ps) [Entry date 09/19/94]
9/19/94	—	Prisoner letter issued as to petitioner Edward D. Coss Jr. with Notice and Consent Form (ps) [Entry date 09/19/94]

9/19/94	—	Case file w/ copy of docket to M.J. Blewitt. Copy of docket to J. Caldwell. (ps) [Entry date 09/19/94]
9/26/94	5	ORDER by Magistrate Thomas M. Blewitt; IT IS HEREBY ORDERED THAT: 1. Petitioner's application for leave to proceed in forma pauperis (Doc 2) is granted. 2. The Clerk is directed forthwith to serve a copy of the petition and this order by cert mail on the Atty Gen of The Co of Pa and the DA of Lacka Co, Pa. 3. Respondents, within 20 days of the date of this order, shall respond to the petition for writ of habeas corpus in the manner required by Rule 5, 28 USCA. foll. Sec 2254. 4. A determination as to whether there will be a hearing will be made after the filing of a response. 5. Petitioner may, if he so desires, file a reply to the response within 10 days of its filing. 6. The Clerk is directed to note the address of the DA of Lacka Co, Pa, on the front of the docket sheet in this case. All documents filed by the parties and by the Court shall be served upon the District Attorney. Copy to plf. Copy of Petition and this Order to Atty Gen of Pa and DA of Lacka Co. by cert mail. (jb) [Entry date 09/27/94]
9/27/94	—	Remark; Doc #5 to Blewitt (jb) [Entry date 09/27/94]

10/5/94	6	RETURN OF SERVICE executed upon respondent Lackawanna County Di 9/29/94 (rm) [Entry date 10/05/94]
10/5/94	6	RETURN OF SERVICE executed upon respondent PA Attorney General 9/30/94 (rm) [Entry date 10/05/94]
10/6/94	7	Letter to Lackawanna Co. D.A. Barrasse from respondent PA Deputy Attorney General Filipi RE D.A.'s office is best to handle case. (rm) [Entry date 10/07/94]
10/7/94	—	7 to J.Blewitt. (rm) [Entry date 10/07/94]
10/31/94	8	LETTER — to clerk from petitioner dated 10/26/94 asking the status of the response to petition and his Motion for appt of cn. (jb) [Entry date 11/01/94]
11/1/94	—	Remark; Doc #8 to Blewitt (jb) [Entry date 11/01/94]
11/1/94	9	ORDER by Magistrate Thomas M. Blewitt Petnr's motion for appointment of counsel [4-2] is DENIED. (cc: all counsel and petnr) (jw) [Entry date 11/02/94]
11/1/94	10	ORDER by Magistrate Thomas M. Blewitt 1. Petnr's motion to amend Habeas Corpus Federal Rule 2254 (Relief Sought) [4-1] is hereby DENIED. 2. Petnr's request for

		evidentiary hrg (Doc. 4 Par. 4) is hereby DENIED. (cc: all counsel and pltf) (jw) [Entry date 11/02/94]
11/1/94	11	ORDER by Magistrate Thomas M. Blewitt Response to petition ddl is due 11/8/94 for PA Attorney General, for Lackawanna County Di (cc: all counsel and pltf) (jw) [Entry date 11/02/94]
11/2/94	—	Remark Doc #9 to Mag Judge Blewitt (jw) [Entry date 11/02/94]
11/2/94	—	Remark Doc #10 to Mag Judge Blewitt (jw) [Entry date 11/02/94]
11/2/94	—	Remark Doc #11 to Mag Judge Blewitt (jw) [Entry date 11/02/94]
12/7/94	12	RESPONSE by respondent Lackawanna County Di, respondent PA Attorney General to habeas corpus petition [1-1] (ps) [Entry date 12/07/94]
12/12/94	13	ORDER by Magistrate Thomas M. Blewitt; IT IS HEREBY ORDERED THAT: 1. The Respondents shall file a brief on the issues raised in Pars 11 and 17 of respondents' answer to the Petition on or by Jan 3, 1995. 2. Said response shall conform to the requirements set forth at Rule 5, 28 USCA foll. Sec 2254. Copy to plf and cn. (jb) [Entry date 12/13/94]

12/12/94	14	Letter to court from petitioner Edward R. Coss Jr. re discussion of case (jw) [Entry date 12/14/94]
12/13/94	—	Remark; Doc #13 to Blewitt (jb) [Entry date 12/13/94]
12/14/94	—	Remark Doc #14 to Mag Judge Blewitt (jw) [Entry date 12/14/94]
12/15/94	15	REPLY — by petitioner to respondents response. Copy to atty for deft. (jb) [Entry date 12/15/94]
12/15/94	—	Remark; Doc #15 to Blewitt (jb) [Entry date 12/15/94]
1/19/95	16	REQUEST — by petitioner for permission to file for sum judg as defts did not comply with Order to file briefs by Jan 3, 1995. (jb) [Entry date 01/20/95]
1/20/95	—	Remark; Doc #16 to Blewitt (jb) [Entry date 01/20/95]
1/23/95	17	ORDER by Mag. Thomas M. Blewitt THAT respdts shall comply w/court's order of 12/12/94 by 2/1/95. (cc: all counsel) (rm) [Entry date 01/23/95]
1/27/95	18	Letter to court from petitioner Edward R. Coss Jr. indicating that he does not want

		the magistrate on this case. (cl) [Entry date 01/27/95]
1/27/95	19	LETTER — to Mag from petitioner dated 1/25/95 objecting to Mag/Judge's orders. Copy to cn. (jb) [Entry date 01/30/95]
1/30/95	—	Remark; Doc #19 to Blewitt (jb) [Entry date 01/30/95]
2/27/95	20	MEMORANDUM BRIEF FILED — by respondents regarding order [17-1], relative to paragraphs 11 and 17 of respondents answer; C of S (jb) [Entry date 02/27/95]
2/27/95	—	Remark; Doc #20 to Blewitt (jb) [Entry date 02/27/95]
3/10/95	21	REQUEST — by petitioner for entry of default for failure to file a brief, as directed in Courts Order of 1/23/95, by 2/1/95. C of S (jb) [Entry date 03/10/95]
3/10/95	22	MOTION — by petitioner for default judgment against defts for failure to file brief by 2/1/95. C of S in Doc #21 (jb) [Entry date 03/10/95]
3/10/95	—	Remark; Doc #21 and 22 to Blewitt (jb) [Entry date 03/10/95]

4/10/95	23	Letter to court from petitioner Edward R. Coss Jr. request for status of default & case. (jw) [Entry date 04/11/95]
4/11/95	—	Remark Doc #23 to Mag Judge Blewitt (jw) [Entry date 04/11/95]
4/24/95	24	MOTION by petitioner for summary judgment (jw) [Entry date 04/25/95]
4/24/95	25	Affidavit of Edward R. Coss, Pltf in support motion for summary judgment [24-1] (jw) [Entry date 04/25/95]
4/25/95	—	Remark Docs #24 & 25 to Mag Judge Blewitt (jw) [Entry date 04/25/95]
4/25/95	26	Letter to court from petitioner Edward R. Coss Jr. RE status of case. (rm) [Entry date 04/25/95]
4/25/95	—	26 to J.Blewitt. (rm) [Entry date 04/25/95]
4/27/95	27	Letter to court from petitioner dated 4/20/95 re discussion of case (jw) [Entry date 04/27/95]
4/27/95	—	Remark Doc #27 to Mag Judge Blewitt (jw) [Entry date 04/27/95]
5/1/95	28	Letter to court from petitioner Edward R. Coss Jr. regarding the respondents response to the petition (cl) [Entry date 05/02/95]

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5/2/95	—	Remark: doc 28 to MJ Blewitt (cl) [Entry date 05/02/95]
6/21/95	29	MOTION by petitioner Edward R. Coss Jr. to compel w/ C of S. (ps) [Entry date 06/21/95]
7/5/95	30	Letter to court from petitioner Edward R. Coss Jr. RE status of case. (rm) [Entry date 07/05/95]
7/5/95	—	30 to J.Blewitt. (rm) [Entry date 07/05/95]
7/13/95	31	ORDER by Magistrate Thomas M. Blewitt denying request for entry of default [21-1] denying motion for default judgment against defts [22-1] denying motion for summary judgment [24-1] denying motion to compel [29-1] (cc: all counsel) (rm) [Entry date 07/13/95]
7/13/95	—	31 to J.Blewitt. (rm) [Entry date 07/13/95]
7/13/95	32	ORDER by Mag. Blewitt (1) Federal Public Defender is appted for Edward R. Coss Jr. (2) Clerk to serve copy of docket, petn & brief in sup. of petn., respt's ans. to petn., traverse, & memo brief of respdts relative to para 11 & 17 of respts' answer (3) In person status conf. to be held on 8/7/95 at 10:00 am in chambers. (cc: all counsel) (rm) [Entry date 07/13/95]

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7/31/95	33	ORDER by Magistrate Thomas M. Blewitt — 1. The in person status conference scheduled for 8/7/95 at 10:00 a.m. has been rescheduled to take place on 8/7/95 at 9:30 a.m. (cc: pltf & all counsel) (ao) [Entry date 07/31/95]
7/31/95	—	Remark: Doc #33 to Mag Judge Blewitt (ao) [Entry date 07/31/95]
8/7/95	34	ORDER by Magistrate Thomas M. Blewitt 1. Petnr shall file a brief on the issue of exhaustion by 8/28/95. 2. respondent shall file a response to petnr's brief by 9/18/95. (cc: all counsel) (ls) [Entry date 08/07/95]
8/7/95	—	Remark doc 34 to Blewitt (ls) [Entry date 08/07/95]
8/8/95	35	Minute Sheet of Status Conference held on 8/7/95 at 9:30 a.m. REMARKS: Scheduling discussed. As appropriate order will issue. CTR: None (ao) [Entry date 08/08/95]
8/8/95	—	Remark: Doc #35 to Mag Judge Blewitt (ao) [Entry date 08/08/95]
8/23/95	36	BRIEF FILED by petitioner Edward R. Coss Jr. regarding exhaustion. (rm) [Entry date 08/24/95]
8/24/95	—	36 to J.Blewitt. (rm) [Entry date 08/24/95]

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8/29/95	37	Voucher — for payment of transcript in the amount of $135.00. (TMB) (jb) [Entry date 08/30/95]
9/15/95	38	Notice by respondent of filing of state court appellate brief. w/attchmt & c/s. (rm) [Entry date 09/15/95]
9/15/95	—	38 to J.Blewitt. (rm) [Entry date 09/15/95]
9/15/95	39	BRIEF FILED by respondent Lackawanna County Di, respondent PA Attorney General regarding exhaustion & c/s. (rm) [Entry date 09/15/95]
9/15/95	—	39 to J.Blewitt. (rm) [Entry date 09/15/95]
9/21/95	40	MOTION by petitioner Edward R. Coss Jr. to extend time to file a reply to memo of resp. re: exhaustion Cert. of con. C of S. (bs) [Entry date 09/22/95]
9/22/95	—	Remark doc. 40 to Mag/Judge Blewitt on 9/22/95. (bs) [Entry date 09/22/95]
9/26/95	41	ORDER by Magistrate Thomas M. Blewitt granting motion to extend time to file a reply to memo of resp. re: exhaustion [40-1]. Coss to file reply brief by 10/10/95. (cc: all counsel) (rm) [Entry date 09/26/95]
9/26/95	—	41 to J.Blewitt. (rm) [Entry date 09/26/95]

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10/6/95	42	Reply brief by petitioner in support of (jb) [Entry date 10/10/95]
10/10/95	—	Remark; Doc #42 to Blewitt (jb) [Entry date 10/10/95]
10/30/95	43	MEMORANDUM AND ORDER: by Magistrate Thomas M. Blewitt 1. In accordance with the attached Memo, the Petnr is hereby excused from fulfilling the exhaustion requirement. 2. The Petnr is afforded 30 days to file an amd petn. (cc: all counsel) (ls) [Entry date 10/31/95]
10/31/95	—	Remark doc 43 to Blewitt (ls) [Entry date 10/31/95]
11/29/95	44	Amendment by petitioner to habeas corpus petition [1-1] and c/s (jw) [Entry date 11/30/95]
11/29/95	45	MOTION by petitioner Edward R. Coss Jr. for expansion of record to include the state record from the Lackawanna County Court of Common Pleas with Cert of Con/Non-Concurrence and Cert of Service. (ao) [Entry date 11/30/95]
11/30/95	—	Remark Doc #44 to Mag Judge Blewitt (jw) [Entry date 11/30/95]
11/30/95	—	Remark: Doc #45 to Mag Judge Blewitt. (ao) [Entry date 11/30/95]

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11/30/95	46	SUPPLEMENTAL CERTIFICATE OF CONCURRENCE — filed by atty for plf. RE: Motion on Expansion of record. C of S (jb) [Entry date 12/01/95]
12/1/95	—	Remark; Doc #46 to Blewitt (jb) [Entry date 12/01/95]
12/6/95	47	ORDER by Magistrate Thomas M. Blewitt; IT IS HEREBY ORDERED AND DECREED that the Motion is granted and the record in the instant case is expanded to include the entire court file, including transcripts, from the Lacka County Court of Common Pleas in Commonwealth v. Coss, No. 645 of 1986. William P. Rinaldi, Clerk of Judicial Records, Lacka County Courthouse, Scr., Pa. is hereby directed to transmit the record to the Federal Court Clerk, Scr., Pa. The Clerk is directed to file and docket said file accordingly upon receipt. (cc: all counsel and Rinaldi by cert mail) (jb) [Entry date 12/06/95]
12/8/95	48	Acknowledgement Received William P. Rinaldi, Clerk of Judicial Records by cert mail on 12/7/95 (ls) [Entry date 12/12/95]
12/12/95	—	Remark doc 48 to Blewitt (ls) [Entry date 12/12/95]

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12/12/95	49	ORIGINAL COUNTY COURT RECORD — received from Lacka Co Court House as per Order of Court. "Copies made for file" ORIG RETURNED, VIA CERT MAIL ON 12/13/95. (jb) [Entry date 12/13/95] [Edit date 12/13/95]
12/14/95	50	NOTICE — by petitioner of change of address to Coal Township. CC on letter. (jb) [Entry date 12/18/95]
12/18/95	—	Remark; Doc #50 to Blewitt (jb) [Entry date 12/18/95]
12/18/95	51	Acknowledgement Received — received from Wm. Rinaldi, County Court in Scr., Pa for case file of plf dated 12/11/95. (jb) [Entry date 12/18/95]
12/18/95	—	Remark; Doc #51 to Blewitt (jb) [Entry date 12/18/95]
2/2/96	52	LETTER — to court from cn for petitioner dated 1/26/96 stating there has been no response to Amended Habeas Corpus Petition. (jb) [Entry date 02/02/96]
2/2/96	53	ORDER by Magistrate Thomas M. Blewitt; IT IS HEREBY ORDERED that respondents shall show cause before this Court by Feb 12, 1996, why petitioner should not be granted habeas corpus relief

		in this action, as respondents have failed to respond to the Amended Habeas Corpus Petition. Copy to plf and cn. (jb) [Entry date 02/02/96]
2/12/96	54	RESPONSE by respondent Lackawanna County DA, respondent PA Attorney General to Amended Petition for Writ of habeas corpus petition [1-1] (ao) [Entry date 02/13/96]
2/12/96	55	Response by respondent Lackawanna County DA, respondent PA Attorney General to the direction of the ct that cause be shown as to why habeas corpus relief ought not be granted with Cert of Service and Exhibits. (ao) [Entry date 02/13/96]
2/13/96	—	Remark: Doc #54 & #55 to Mag Judge Blewitt. (ao) [Entry date 02/13/96]
2/16/96	56	Reply by Edward R. Coss Jr. to response to show cause why H/C relief should not be granted. C of S (ls) [Entry date 02/16/96]
2/16/96	—	Remark doc 56 to Blewitt (ls) [Entry date 02/16/96]
3/4/96	57	LETTER — to court from Atty O'Malley dated 2/13/96 Re: Explanation for not answer Petition on time. (jb) [Entry date 03/04/96]

3/4/96	—	REMARK — Doc #57 to Blewitt (jb) [Entry date 03/04/96]
3/28/96	58	ORDER by Magistrate Thomas M. Blewitt — 1. Petnr shall file a brief on the issues raised in the Amended Petition by 4/11/96. 2. Respndts shall file a response by 4/25/96. 3. Petnr may file a reply to the response by 5/3/96. 4. A determination as to whether there will be a hearing made after the filing of a response. (cc: pltf & all counsel) (ao) [Entry date 03/28/96]
3/28/96	—	REMARK — Doc #58 to Mag Judge Blewitt. (ao) [Entry date 03/28/96]
3/28/96	59	LETTER — to court atty for plf dated 2/22/96 enclosing a copy of the Pa Superior Court's opinion in Co v. Coss and stating this opinion supports the argument set forth in plf's reply filed on Feb 16, 1996. CC thereon. (jb) [Entry date 03/29/96]
3/29/96	—	REMARK — Doc #59 to Blewitt (jb) [Entry date 03/29/96]
4/10/96	60	MOTION by petitioner Edward R. Coss Jr. to extend time to file habeas corpus brief with Cert of Concurrence and Cert of Service. (ao) [Entry date 04/11/96]
4/11/96	—	REMARK — Doc #60 to Mag Judge Blewitt. (ao) [Entry date 04/11/96]

4/12/96	61	ORDER by Magistrate Thomas M. Blewitt — Pltf's motion to extend time to file habeas corpus brief is GRANTED. Coss shall file a brief on the issue raised in the Amended Habeas Corpus Petition by 5/9/96. Respts shall file a response by 5/23/96. Coss may file a reply to the response by 5/31/96. A determination as to whether there will be a hearing will be made after the filing of a response. (cc: pltf & all counsel) (ao) [Entry date 04/12/96]
4/12/96	—	REMARK — Doc #61 to Mag Judge Blewitt. (ao) [Entry date 04/12/96]
5/9/96	62	BRIEF FILED by petitioner Edward R. Coss Jr. regarding amended H/C petn. [44-1] (rm) [Entry date 05/12/96]
5/9/96	63	NOTICE by petitioner Edward R. Coss Jr. OF CHANGE OF ADDRESS to SCI-Rockview (jw) [Entry date 05/14/96]
5/12/96	—	62 to J.Blewitt. (rm) [Entry date 05/12/96]
5/14/96	—	REMARK — Doc #63 to M.J. Blewitt (jw) [Entry date 05/14/96]
5/23/96	64	AMENDED MEMORANDUM BRIEF — of respondents on the matter of petitioner's amended habeas corpus petition; C of S (jb) [Entry date 05/23/96]

5/23/96	—	REMARK — Doc #64 to Blewitt (jb) [Entry date 05/23/96]
5/23/96	65	MEMORANDUM brief of respondents on the matter of petnr's and h/c petn. C of S (ls) [Entry date 05/24/96]
5/24/96	—	REMARK — doc 65 to Blewitt (ls) [Entry date 05/24/96]
5/31/96	66	REPLY BRIEF — by petitioner to the Commonwealth's amended Memo brief on the matter of pet's amended habeas corpus petition; C of S (jb) [Entry date 06/03/96]
6/3/96	—	REMARK — Doc #66 to Blewitt (jb) [Entry date 06/03/96]
6/27/96	67	ORDER; by Magistrate Thomas M. Blewitt; IT IS HEREBY ORDERED AS FOLLOWS: 1. For the reasons set forth in the Petitioner's Reply Brief dated May 31, 1996, (Doc 66) the Respondent is to file a brief that addresses the merits of the issues set forth in the Petitioner's Amended Petition for Writ of HC (Doc 44) within 10 days of the date of this order. Copy to plf and cn. (jb) [Entry date 06/27/96]
6/27/96	—	REMARK — Doc #67 to Blewitt (jb) [Entry date 06/27/96]

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7/8/96	68	Additional MEMORANDUM brief by respondents on the matter of petnr's amd H/C Petn and C of S (ls) [Entry date 07/09/96]
7/9/96	—	REMARK — doc 68 to Blewitt (ls) [Entry date 07/09/96]
7/22/96	69	REPLY by petitioner Edward R. Coss Jr. to Commonwealth's additional memo brief (Doc #68) with Cert of Service. (ao) [Entry date 07/24/96]
7/24/96	—	REMARK — Doc #69 to Mag Judge Blewitt. (ao) [Entry date 07/24/96]
10/23/96	70	ORDER by Magistrate Thomas M. Blewitt; the petitioner is afforded 15 days to either withdraw the unexhausted claims contained in the Amended Petition for Writ of HC and proceed on the exhausted claims, or to withdraw the petition in its entirety and pursue the claims in state court. Copy to plf and cn. (jb) [Entry date 10/23/96]
10/23/96	—	REMARK — Doc #70 to Blewitt (jb) [Entry date 10/23/96]
11/6/96	71	MAIL RETURNED addressed to Edward R. Coss Jr. containing order of 10/23/96 "Released" (ls) [Entry date 11/06/96]

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11/6/96	—	REMARK — doc 71 to Blewitt (ls) [Entry date 11/06/96]
11/7/96	72	2nd PETITION FOR WRIT OF HABEAS CORPUS and C of S (ls) [Entry date 11/08/96]
11/20/96	73	ORDER TO SHOW CAUSE: by Magistrate Thomas M. Blewitt — Respdts, w/in 20 days, shall respond to the second amended petition for writ of habeas corpus; response to petition due 12/10/96 for PA Attorney General, for Lackawanna County. A determination as to whether there will be a hearing will be made after the filing of a response. Petnr may, if desires, file a reply to the response w/in 10 days of its filing (cc: petnr, all counsel) (ao) [Entry date 11/20/96]
11/20/96	—	REMARK — Doc #73 to Mag Judge Blewitt. (ao) [Entry date 11/20/96]
12/2/96	74	MAIL RETURNED addressed to Edward R. Coss Jr., re-mailed to FPD Melinda Ghilardi. (ep) [Entry date 12/03/96]
12/9/96	75	ANSWER — to second amended HC petition by respondents [72-1] C of S (jb) [Entry date 12/11/96]
12/11/96	—	REMARK — Doc #75 to Blewitt (jb) [Entry date 12/11/96]

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12/12/96	76	ORDER by Magistrate Thomas M. Blewitt — Respdts shall file a brief addressing the issues raised in paragraph 3(2)(A) and (B) of petnr's Second Amended Habeas Corpus Petition. (cc: petnr & all counsel) (ao) [Entry date 12/16/96] [Edit date 12/16/96]
12/16/96	—	REMARK — Doc #76 to Mag Judge Blewitt. (ao) [Entry date 12/16/96]
12/26/96	77	AMENDMENT by respondent to 2nd amd h/c petn [75-1] C of S (ls) [Entry date 12/26/96]
12/26/96	—	REMARK — doc 77 to Blewitt (ls) [Entry date 12/26/96]
1/17/97	78	MAIL RETURNED addressed to Edward R. Coss Jr. (Order of 12/12/96 marked 'refused') (ep) [Entry date 01/22/97]
4/10/97	79	Report and Recommendation by Magistrate Thomas M. Blewitt recommending ptnrs petition for writ of h/c be denied.; objections to R and R due 4/29/97 (cc: all counsel) (ep) [Entry date 04/11/97]
4/11/97	—	Case file placed in Rm 423 awaiting obj's to Mag. Blewitt's R & R (last day 4/29/97). (ep) [Entry date 04/11/97]

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4/24/97	80	MOTION by petitioner Edward R. Coss Jr. to extend time until 5/8/97 to file objs to the mag/judge's r/r & c/s (jw) [Entry date 04/25/97]
4/25/97	—	REMARK — Doc #80 to Hsbg (jw) [Entry date 04/25/97]
4/30/97	—	REMARK — case file w/ copy of docket to Judge Caldwell (cl) [Entry date 04/30/97]
5/2/97	—	REMARK — Case file to J. Caldwell. (am) [Entry date 05/02/97]
5/6/97	81	ORDER by Judge William W. Caldwell granting motion to extend time until 5/8/97 to file objs to the mag/judge's R & R. [80-1] Objections to R/R due 5/8/97 (cc: all counsel & Ct.) (jh) [Entry date 05/07/97]
5/8/97	82	OBJECTIONS by petitioner to [79-1] REPORT AND RECOMMENDATION and C of S (ls) [Entry date 05/09/97]
5/8/97	83	MEMORANDUM in support by petitioner to objections to report & recommendation and C of S (ls) [Entry date 05/09/97]
5/9/97	—	REMARK — docs 82, 83 to HBG (ls) [Entry date 05/09/97]

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6/16/97	84	ORDER by Judge William W. Caldwell — this matter be transferred to a judge in the Scranton Division for consideration of the Magistrate Judge's report and recommendation and such further proceedings as needed. Case reassigned to Judge Thomas I. Vanaskie (cc: pltf, all counsel) (cl) [Entry date 06/18/97]
6/18/97	—	REMARK — case file to KC to be forwarded to Judge Vanaskie (cl) [Entry date 06/18/97]
8/11/97	85	NOTICE by petitioner Edward R. Coss Jr. OF CHANGE OF ADDRESS (ep) [Entry date 08/11/97]
1/13/98	86	NOTICE by petitioner Edward R. Coss Jr. OF CHANGE OF ADDRESS (ep) [Entry date 01/13/98]
1/20/98	87	ORDER by Judge Thomas I. Vanaskie THAT: 1) Obj's to those parts of M.J.Blewitt's R/R concerning petnr's ineffective assistance of counsel claims are SUSTAINED; 2) Petnr's obj's to that part of the R/R concerning the computation of Petnr's sentence on the 1986 conviction are OVERRULED on the ground that the challenge to the validity of his sentence is MOOT; 3) Telephonic Scheduling conf set for 10:00 a.m. on 2/6/98 (cc: all counsel) (ep) [Entry date 01/20/98]

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1/28/98	88	LETTER to court dated 1/26/98 from petitioner Edward R. Coss Jr. requesting telephonic scheduling conference be continued. (ep) [Entry date 01/29/98]
1/28/98	89	ORDER by Judge Thomas I. Vanaskie granting letter [88-1] Scheduling conf re-scheduled for 5:00 p.m. on 2/4/98 (cc: all counsel) (ep) [Entry date 01/29/98]
2/5/98	90	MINUTE SHEET of 2/4/98 scheduling conference. (rm) [Entry date 02/09/98]
2/9/98	91	ORDER by Judge Thomas I. Vanaskie THAT:; Status report due 2/28/98,; Evidentiary hearing set for 4/20/98 The scheduling of a pre-hearing conference will be deferred until rect of a letter report from petnr's counsel pertaining to the number of witnesses and anticipated length of such evidentiary hearing. (cc: all counsel) (ep) [Entry date 02/09/98]
2/25/98	92	LETTER to court dated 2/24/98 from petitioner Edward R. Coss Jr. advising Court of number of anticipated witnesses. (ep) [Entry date 02/25/98]
4/10/98	93	ORDER by Judge Thomas I. Vanaskie In-court evidentiary hearing 9:00 a.m. on 4/20/98; If hearing is not concluded on that date, the date for resumption of the hearing

		will be set by further order of this Court. (cc: all counsel) (ep) [Entry date 04/10/98]
4/15/98	94	WRIT OF HABEAS CORPUS AD TESTIFICANDUM by Judge Thomas I. Vanaskie: The Warden of the State Correctional Institution at Camp Hill, Pennsylvania, is directed to produce the person of Edward R. Coss, Jr. at the United States District Court, William J. Nealon Federal Bldg. & U.S. Courthouse, 235 North Washington Avenue, Scranton, Pennsylvania on Monday, April 21, 1998, at 9:00 a.m. for an evidentiary hearing, and to keep the prisoner safe in custody and confine him from day to day when not appearing before the Court. The prisoner shall be presented at the United States Marshal's Office on the second floor. At the final conclusion of the proceedings, the Warden of the State Correctional Institution at Camp Hill shall return Edward R. Coss, Jr. to the State Correctional Institution at Camp Hill. (cc: all counsel, 3 cert cc to U.S. Marshal Scranton, 3 cert cc to Warden, telefax to Warden) (ep) [Entry date 04/15/98]
4/16/98	95	MOTION SEALED — (pursuant to Court Order) (ep) [Entry date 04/16/98] [Edit date 04/16/98]

4/16/98	96	ORDER SEALED (pursuant to Court Order) re sealed motion [95-1] (ep) [Entry date 04/16/98]
4/21/98	97	MINUTE SHEET of Evidentiary hearing held 4/20/98, J.Vanaskie presiding CTR: Janes (ep) [Entry date 04/21/98]
5/12/98	98	TRANSCRIPT filed of Evidentiary hearing held 4/20/98 before J.Vanaskie; CTR: Kristin L. Janes (ep) [Entry date 05/12/98]
5/29/98	99	CJA FORM 24 (approved for transcript payment) in the sum of $ 142.50, voucher # 67808112477, CTR: Janes (bs) [Entry date 05/29/98]
6/8/98	100	MEMORANDUM AND ORDER: by Judge Thomas I. Vanaskie denying habeas corpus petition [72-1] Case terminated (ORIGINAL TO SECURITY, cert cc to file, cc: all counsel) (ep) [Entry date 06/08/98]
6/8/98	101	PLTF'S EXHIBIT LIST by petitioner Edward R. Coss Jr. (ep) [Entry date 06/10/98]
6/25/98	102	APPLICATION by petitioner for certificate of appealability. C/S (cm) [Entry date 06/29/98]

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7/2/98	103	ORDER by Judge Thomas I. Vanaskie — The ptnrs' application for Certificate of Appealability [102-1] is granted as to the issue identified at III-D of this Court's Memorandum decision of June 8, 1998. (cc: all counsel) (cl) [Entry date 07/02/98]
7/2/98	—	REMARK — doc 102 & 103 to closed file (cl) [Entry date 07/02/98]
7/6/98	104	NOTICE OF APPEAL by petitioner Edward R. Coss Jr. from District Court order filed 6/8/98 [100-2] (Filing fee waived, TPO mailed to attorney, certified copies of notice of appeal, order being appealed and docket entries along with info/ack letter to USCA. (cc: cnsl, Ct., MJ Blewitt, USCA) (cl) [Entry date 07/09/98]
8/3/98	105	NOTIFICATION by Circuit Court of Appellate Docket Number 98-7416. (jh) [Entry date 08/04/98]
8/4/98	—	REMARK — Document 105 sent to appeal section in Scranton. (jh) [Entry date 08/04/98]
8/7/98	106	TRANSCRIPT PURCHASE ORDER filed by Daniel Siegel, Esquire stating that the transcript is already on file in the U.S.D.C. (jh) [Entry date 08/10/98]

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8/10/98	—	DISTRICT COURT RECORD COMPLETE FOR PURPOSES OF APPEAL (jh) [Entry date 08/10/98]
8/10/98	—	CERTIFIED COPY of docket entries to be filed as the cert. list in lieu of the record. (jh) [Entry date 08/10/98]
8/10/98	—	REMARK — Document 106 sent to Scranton. (jh) [Entry date 08/10/98]
8/24/98	107	ACKNOWLEDGEMENT RECEIVED — by USCA of receipt on 8/12/98 of cert. list in lieu of the record. (jh) [Entry date 08/25/98]
8/25/98	—	REMARK — Document 107 sent to Scranton. (jh) [Entry date 08/25/98]
10/14/98	108	STENO NOTES of proceedings. Evidentiary Hearing 4/20/98 CTR: K. Janes (sm) [Entry date 10/14/98]
10/14/98	—	REMARK — Doc #108 (CR Notes) to CFR (sm) [Entry date 10/14/98]
4/12/99	—	REMARK — case file to C/A per Lynn Caswell. (sm) [Entry date 04/12/99]
4/12/99	—	Record on appeal transmitted to Circuit consisting of docs 2-107, (sm) [Entry date 04/12/99] [Edit date 04/12/99]

4/15/99	109	Acknowledgement Received from C/A re: actual record with copies of docket (sm) [Entry date 04/15/99]
8/2/99	110	COPY of Appellate Court Order: A majority of the active judges having voted for rehearing en banc in the above appeal, it is ordered that the Clerk of this Court vacate the opinion filed June 28, 1999 and list the above for rehearing en banc at the convenience of the court. (ps) [Entry date 08/04/99]
3/23/00	111	CERTIFIED COPY OF JUDGMENT — ORDERED & ADJUDGED by this crt. that the jgm. of the said District Court entered 6/8/98, be, and the same is hereby reversed and the cause is remanded to the District Court with direction to issue a writ of habeas corpus conditional on the Commonwealth's option of conducting a new trial and if the new trial produces a verdict different from the prior verdict, the state must resentence Mr. Coss to acct. for any enhancement due to this guilty verdict or the Commonwealth has the option of proceeding into resentencing on the 1990 conviction. Costs taxed against appellees. All of the above in accord. w/the opinion of this crt. A cert. true copy dtd. 2/29/00. [104-1] cc: Crt. (am) [Entry date 03/24/00]

3/24/00	—	REMARK — Case file sent to Judge Vanskie per COA reversal/remand. (am) [Entry date 03/24/00]
3/27/00	—	REMARK — Doc 110 to CJ Vanaskie. (kn) [Entry date 03/27/00]
5/18/00	112	ORDER by Chief Judge Thomas I. Vanaskie Telephonic Status conference to be held at 8:30 on 5/22/00 Atty Siegel is responsible for place the call., Clerk of court is directed to fax order to counsel. (cc: all counsel court) (sm) [Entry date 05/18/00]
5/25/00	113	MINUTE SHEET of Status Conference held 5/22/00 CTR: NONE (sm) [Entry date 05/26/00]
7/10/00	114	PETITION by petitioner Edward R. Coss Jr. for release and to schedule evidentiary hearing; Cert. of Non-Conc.; C/S; Propo. (vg) [Entry date 07/11/00]
7/10/00	115	BRIEF by petitioner Edward R. Coss Jr. IN SUPPORT of petition for release and to schedule evidentiary hearing [114-1]; C/S. (vg) [Entry date 07/11/00]
7/11/00	—	REMARK — Docs. #114 and #115 to J. Vanaskie. (vg) [Entry date 07/11/00]

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7/18/00	116	LETTER to court dated 7/3/00 from petitioner Edward R. Coss Jr. re bail request. (sm) [Entry date 07/18/00]
7/18/00	117	LETTER to court dated 7/11/00 from petitioner Edward R. Coss Jr. re support of request for bail (sm) [Entry date 07/18/00]
7/18/00	118	ORDER by Chief Judge Thomas I. Vanaskie GRANTING motion for evidentiary hearing re petition for release to be held on 8/1/00 at 10:00 AM. [114-1]; 10:00 8/1/00 (cc: all counsel court) (sm) [Entry date 07/18/00]
7/26/00	119	EX PARTE MOTION/PETITION by petitioner Edward R. Coss Jr. for writ of habeas corpus ad testificandum; w/ Proposed Writ (pm) [Entry date 07/27/00]
7/28/00	120	ORDER by Chief Judge Thomas I. Vanaskie THAT: The evidentiary hearing previously scheduled for Tuesday, August 1, 2000 at 10:00 a.m. has been rescheduled to Thursday, August 10, 2000 at 1:00 p.m.; Evidentiary hearing 1:00 8/10/00 (cc: all counsel court, faxed) (ta) [Entry date 07/28/00]
8/1/00	121	WRIT OF HABEAS CORPUS AD TESTIFICANDUM by Chief Judge Thomas I. Vanaskie ordering the Warden

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or to the US MARSHAL to produce Edward R. Coss, Jr. to Middle District Court of PA, Scranton August 10, 2000 at 1:00 pm (cc: 3 cert copies to US Marshal, cr, all counsel, warden) (sm) [Entry date 08/01/00] [Edit date 08/01/00]

8/9/00	122	RESPONSE by respondent Lackawanna County District Atty to Deft's petition for release (sm) [Entry date 08/10/00]
8/11/00	123	MINUTE SHEET of Evidentiary Hearing held on 8/10/00 at 10:30 a.m. before Judge Vanaskie. CTR: Janes (ao) [Entry date 08/11/00]
8/11/00	124	EXHIBIT LIST submitted by respondents. (sm) [Entry date 08/14/00]
8/23/00	125	MEMORANDUM AND ORDER: by Chief Judge Thomas I. Vanaskie denying petition motion for release and to schedule evidentiary hearing [114-1], denying petition [114-2] (cc: all counsel court) (ps) [Entry date 08/23/00]
8/23/00	126	EXHIBIT LIST by respondent Lackawanna County Di, respondent PA Attorney General (sm) [Entry date 08/28/00]
8/29/00	127	NOTICE by petitioner Edward R. Coss Jr. OF CHANGE OF ADDRESS to Graterford PA. (sm) [Entry date 08/29/00]

APPENDIX B — COURT OF APPEALS DOCKET ENTRIES

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 98-7416 Filed: 7/31/98
Nsuit: 3530 Prisoner: Habeas Corpus
Coss v. Dist Atty Lackawanna, et al
Appeal from: U.S. District Court for the Middle District of Pennsylvania

* * *

EDWARD R. COSS #CB-5970, JR.

Appellant

v.

DIST ATTY LACKAWANNA;
PA ATTY GEN OFFICE

Appellees

ATTY GEN

Amicus-appellee

7/31/98	CIVIL CASE DOCKETED. Notice by Edward R. Coss, filed. (lal)
7/31/98	ORDER appointing FPD to represent Appellant, filed. (lal)

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7/31/98	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 9/9/98. (lal)
8/7/98	APPEARANCE from Attorney Daniel I. Siegel on behalf of Appellant Edward R. Coss, filed. (lal)
8/10/98	DISCLOSURE STATEMENT on behalf of Appellant Edward R. Coss, filed. (lal)
8/10/98	INFORMATION STATEMENT on behalf of Appellant Edward R. Coss, received. (lal)
8/10/98	TRANSCRIPT PURCHASE ORDER (Part I), already on file in the District Court Clerk's Office, filed. (lal)
8/12/98	CERTIFIED LIST filed. (lal)
8/24/98	FOLLOW UP LETTER to William P. O'Malley, Michael J. Barrasse and Melinda C. Ghilardi requesting the following documents: **Appearance Form (lal)
9/9/98	BRIEF on behalf of Appellant, Pages: 12, Copies: 10, Delivered by mail, filed. Certificate of service date 9/9/98. (lmp)
9/9/98	APPENDIX on behalf of Appellant, Copies: 4 Volumes: 1, Delivered by mail, filed. Certificate of service date 9/9/98. (lmp)

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12/9/98 APPEARANCE from Attorney William P. O'Malley on behalf of Appellees Dist Atty Lackawanna and PA Atty Gen Office, filed. (lal)

12/9/98 BRIEF on behalf of Appellees Dist Atty Lackawanna and PA Atty Gen Office, Pages: 7, Copies: 10, Delivered by mail, filed. Certificate of Service date 10/8/98. (lal)

1/12/99 CALENDARED for Monday, March 1, 1999, (Rescheduled from Tuesday, March 2, 1999). (pl)

2/24/99 LETTER dated 2/23/99 received pursuant to Rule 28(j) from counsel for Appellant Edward R. Coss. (lc)

3/1/99 ARGUED Monday, March 1, 1999 Panel: Stapleton, Rendell, Aldisert, Circuit Judges. (pl)

3/26/99 CLERK'S LETTER to counsel written at the direction of Court requesting the parties to provide the court with a copy of the transcript of the evidentiary hearing held in connection with appellant's ineffective assistance of counsel claim and the associated exhibits, including the police report to the incident at issue. Response due by 4/5/99. (cg)

4/5/99 ANSWER received in accordance with the Court's request from Appellant Edward R. Coss #CB-5970, filed. (cg)

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6/10/99 ANSWER received in accordance with the Court's request from Appellant Edward R. Coss #CB-5970, REC'D ONLY. (cg)

6/28/99 PUBLISHED OPINION (Stapleton, Rendell, Authoring Judge, Aldisert, Circuit Judges), filed. Total Pages: 33. VACATED — SEE COURT ORDER DATED 7/30/99 (clc)

6/28/99 JUDGMENT reversed and the cause is remanded to the said District Court with instruction that it order a writ of habeas corpus to issue conditioned upon Mr. Coss being resentenced withou: consideration of the previous assault conviction. Costs taxed against the appellees, filed. ZZ#VACATED ZZ# — ZZSee ZZ#Court ZZ#Order ZZ#Dated ZZ#7/30/99. (clc)

7/12/99 MOTION by Appellees Dist Atty Lackawanna and PA Atty Gen Office for extension of time to file petition for rehearing, filed. Answer due 7/22/99. Certificate of Service dated 7/9/99. (lc)

7/15/99 ORDER (Clerk) granting motion for extension of time to petition for rehearing by Appellees Dist Atty Lackawanna and PA Atty Gen Office. The petition for rehearing shall be filed on or before July 26, 1999, filed. (lc)

7/26/99 PETITION by Appellees for rehearing en banc. Certificate of service dated 7/26/99, filed. (lc)

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7/30/99 ORDER filed (Coram: Chief Judge Becker, Authoring Judge, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Aldisert, Stapleton, Circuit Judges) granting petition for en banc rehearing by Appellees Dist Atty Lackawanna and PA Attorney General and ordering the Clerk of this Court to vacate the opinion filed June 28, 1999 and list the above for rehearing en banc at the convenience of the Court, filed. (lc)

8/2/99 CALENDARED for Rehearing En Banc on Monday, November 8, 1999. (wab)

8/4/99 SUPPLEMENTAL APPENDIX on behalf of Edward R. Coss. Copies: 14 Volumes: 1 Delivered by mail, received. Certificate of service date 8/3/99. (Received for the information of the court only.) (lrb)

8/5/99 MOTION by Appellees Dist Atty Lackawanna and PA Atty Gen Office to file amended brief for in banc rehearing, filed. Answer due 8/17/99. Certificate of Service dated 8/4/99. (lc)

8/6/99 RESPONSE in Concurrence by Appellant Edward R. Coss to Appellees' motion to file amended briefs, filed. Certificate of service dated 8/5/99. (lc)

8/9/99 Notice of telephone request. Requested additional copied of the appellees' amended brief. Response due in 3 days. (lrb)

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8/27/99 ORDER (Chief Judge Becker, Authoring Judge, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Aldisert, Stapleton, Circuit Judges) granting motion by Appellees DA Lackawanna and PA Atty Gen Office to file amended briefs. The parties are granted leave to file supplemental briefs addressing the subject of the scope of relief that might be afforded to appellant. The Attorney General of Pennsylvania is invited to file a brief amicus curiae. The Court will entertain a single amicus brief in support of the position of the appellant. Appellant's brief shall be filed within three weeks. Briefs on behalf of appellee shall be filed within two weeks thereafter. Appellant may file a reply brief within one week after service of appellee's brief, filed. (lc)

9/17/99 SUPPLEMENTAL BRIEF on behalf of Edward R. Coss #CB-5970. Pages: 7 Copies: 14, Delivered by mail, filed. Certificate of service date 9/17/99. (wab)

10/4/99 SUPPLEMENTAL BRIEF on behalf of Dist Atty Lackawanna, PA Atty Gen Office. Pages: 18, Copies: 14, Delivered by mail, filed. Certificate of service date 10/4/99. (gas)

10/4/99 AMICUS BRIEF on behalf of Atty Gen. Pages: 9, Delivered by mail, filed. Certificate of service date 10/4/99. (gas)

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11/8/99 ARGUED Rehearing En Banc on Monday, November 8, 1999 Panel: Becker, Chief Judge, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry, Aldisert, and Stapleton, Circuit Judges. (cg)

2/29/00 PUBLISHED OPINION (Becker, Chief Judge, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry, Aldisert, Authoring Judge, Stapleton, Circuit Judges). Judges Nygaard and Roth, Dissenting. Judges Rendell and McKee, Concurring and Dissenting, filed. (lc)

2/29/00 JUDGMENT, Reversed and the cause is remanded to the District Court with direction to issue a writ of habeas corpus conditional on the Commonwealth's option of conducting a new trial and if the new trial produces a verdict different from the prior verdict, the state must resentence Mr. Coss to account for any enhancement due to this guilty verdict or the Commonwealth has the option of proceeding into resentencing on the 1990 conviction. Costs taxed against appellees, filed. (lc)

3/22/00 MANDATE ISSUED, filed. (lc)

3/22/00 RECORD released. (lc)

4/19/00 REPORTER at 204 F.3d 453 (3d Cir. 2000) (vkl)

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5/30/00 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellees Dist Atty Lackawanna and PA Atty Gen Office. Filed in the Supreme Court on 5/24/00 at Supreme Ct. case number: 99-1884. (lc)

6/26/00 Respondent's brief in opposition to petition for writ of certiorari together with application to proceed in forma pauperis, received for the information of the Court. (lc)

10/13/00 U.S. Supreme Court order dated 10/10/00 at S.C. number: 99-1884, granting petition for writ of certiorari by Appellees Dist Atty Lackawanna and PA Atty Gen Office and granting motion by Respondent for leave to proceed in forma pauperis, filed. (lc)

10/24/00 MOTION by Appellant Edward R. Coss for modification of record and that the document attached to the motion be certified and made part of the record, filed. Answer due 11/6/00. Certificate of Service dated 10/23/00. (lc)

11/6/00 ORDER (Chief Judge Becker, Authoring Judge) granting motion by Appellant Edward R. Coss, Jr. for modification of record and that the attached document be certified and made part of the record, filed. (lc)

APPENDIX C — CRIMINAL INFORMATION FILED JULY 17, 1986, IN LACKAWANNA COUNTY CRIMINAL CASE NOS. 645(a), (d) AND (e) OF 1986

86 Cr. 645(a)

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD COSS

Counts

1) THE DISTRICT ATTORNEY of Lackawanna County by this information charges that, on (or about) June 26, 1986 in said County, Edward Coss did knowingly desecrate, vandalize, deface and other damage a juvenile detention center, in that the said Edward Coss did smash a window and window screen, did pull off of the wall a sink and commode and smashed them, did smash a light fixture, did damage the cell door, and did tear out the radiator and the pipe for the heat in the cell, in the Lackawanna County Detention Facility, situated at 313 Monroe Avenue, in the City of Scranton, the property of the County of Lackawanna, causing pecuniary loss in excess of $1,000.00.

INSTITUTIONAL VANDALISM.
(18 C.P.S.A. Sec. 3307(a-3) (M-2)

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2) And the District Attorney of Lackawanna County by this information further charges that on or about June 26, 1986 in said County, Edward Coss unlawfully did intentionally and recklessly damage certain tangible property, to wit: smash an outside window and screen, did pull off of the wall a sink and commode and smash them, did smash a light fixture, did damage a cell door, and did tear out the radiator and the pipe for heat in the cell at the Lackawanna County Detention Facility, the property of the County of Lackawanna, causing pecuniary loss in the amount in excess of $1,000.00.

CRIMINAL MISCHIEF
18 C.P.S.A. Sec. 3304(2) (M-2)

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

s/ [illegible]
District Attorney

Appendix C

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

86 Cr. 645(d)

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD COSS

Counts

1) THE DISTRICT ATTORNEY of Lackawanna County by this information charges that, on (or about) June 25, 1986 in said County, Edward Coss did attempt to cause and did intentionally and knowingly cause serious bodily injury to Patrolman Anthony Adamitis of the Dickson City Policy Department, and did attempt to cause and did intentionally and knowingly cause bodily injury to the said patrolman who was making and attempting to make a lawful arrest of the said Edward Coss for the crime of Disorderly Conduct, in that the said Edward Coss did punch the said patrolman in the left side of the face with a closed fist causing the said patrolman's left eye to swell and also causing the said patrolman's eye glasses to break, while the said patrolman was attempting to make a lawful arrest of the said Edward Coss.

AGGRAVATED ASSAULT.
(18 C.P.S.A. Sec. 2702(2)(3) (F-2)

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2) And the District Attorney of Lackawanna County by this information further charges that on or about June 25, 1986 in said County, Edward Coss with the intent of preventing Patrolman Anthony Adamitis of the Dickson City Police, a public servant, from effecting a lawful arrest and discharging another duty, unlawfully did create a substantial risk of bodily injury to the said public servant, and did employ means justifying and requiring substantial force to overcome the resistance.

RESISTING ARREST
(18 C.P.S.A. Sec. 5104) (M-2)

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

s/ [illegible]
District Attorney

Appendix C

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

86 Cr. 645(e)

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD COSS

Counts

1) THE DISTRICT ATTORNEY of Lackawanna County by this information charges that, on (or about) June 25, 1986 in said County, Edward Coss unlawfully did knowingly and intentionally threaten to commit a crime of violence with the intent to terrorize another, in that the said Edward Coss did threaten Patrolmen Anthony Adamitis and Andrew Wrobel, with the crime of Murder, & Assault, with the intent to terrorize them in reckless disregard of the risk of causing such terror and inconvenience.

TERRORISTIC THREATS
(18 C.P.S.A. Sec. 2706) (M-1)

2) And the District Attorney of Lackawanna County by this information further charges that on or about June 25, 1986 in said County, Edward Coss with intent to cause public inconvenience, annoyance and alarm, unlawfully did persist in fighting and

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threatening and in violent and tumultuous behavior and did make unreasonable noise and did use obscene language and did create a hazardous and physically offensive condition by any act which served no legitimate purpose of the actor after reasonable warning and request to desist.

DISORDERLY CONDUCT.
(18 C.P.S.A. Sec. 5503(a-1-2-3-4) (M-3)

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

s/ [illegible]
District Attorney

APPENDIX D — DOCKET SHEET IN LACKAWANNA COUNTY CRIMINAL CASE NO. 645 OF 1986

1. CASE NO. 86-cr-645

* * *

3. LAST NAME Coss

4. FIRST NAME Edward

* * *

DATE	ACTIONS, JUDGMENT AND CASE NOTES
7-7-86	Filed Order and Order of Court, Penetar, Judge.
7-9-86	Filed Amended Order. By the Court, Penetar, Judge.
7-21-86	Filed Petition for reduction of Bail
7-22-86	Filed REQUEST FOR BILL OF PARTICULARS
7-22-86	Filed REQUEST FOR PRETRIAL DISCOVERY & INSPECTION.
7-25-86	Filed Answer to Petition for Reduction of Bail.
7-29-86	Filed Commonwealth's Answer to Request for Pretrial Discovery and Inspection.

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7-29-86	Filed Commonwealth's Response to request for Bill of Particulars
7-29-86	Filed Order. By the Court, Munley, J
7-31-86	Defendant and Robert Helrig each tent in $1000.00
8-1-86	Filed OMNIBUS PRE TRIAL MOTION. RULE
8-6-86	Filed ANSWER TO OMNIBUS PRE TRIAL MOTION
10-31-86	Now Oct. 30, 1986 issue joined, jurors called and sworn in according to the Law, say on same day defense demurrers to charge of Agg. Assault and Terroristic threats, demurrer is sustained. Say on Oct. 31, 1986 they find defendant to charges of Institutional Vandalism, Criminal Mischief and Simple Assault Guilty. To charges of Resisting Arrest and Disorderly Conduct they find defendant Not Guilty. Sentence deferred pending pre sentence investigation. By the Court, Cottone, J.
12-12-86	Filed PETITION TO REVOKE BAIL. RULE
12-31-86	Filed Order. (Revocation of Bail). Munley, J.
1-30-87	Defendant Sentenced to pay costs of prosecution and to serve a min of six Months to a max of one

year on charge of Inst. Vandalism and on simple assault a min of 6 months to a max of 1 year consecutive at a State Corr. Facility.

Cottone, J.

1-30-87 Filed MOTION TO DISMISS UNDER RULE 1100 ORDER. By the Court

2-2-87 Filed PROCEEDINGS AT SENTENCE (Cottone, D. Walsh)

2-3-87 Filed Motion for reconsideration of sentence.

2-9-87 Filed Commonwealth's Answer to Motion to Dismiss Under Rule 1100.

3-2-87 Filed Order. By the Court, (Reschedule hearing on Motion).

3-13-87 Filed Order. By the Court, Cottone, (Petition denied).

3-12-87 Filed Motion for Modification of Sentence Nunc Pro Tunc.

4-3-87 FILED PETITION FOR CREDIT FOR IMPRISONMENT

4-6-87 Filed Order Dismissing petition for credit.

6-10-87 Filed Application for Order Mandating Clerk of Courts to furnish court records.

1-12-87 Filed PETITION UNDER POST CONVICTION HEARING ACT

6-23-87 Filed ORDER — pro se application is DENIED By the Court, Cottone, J

6-29-87 Filed Commonwealth's Answer to Petition Under Post Conviction Hearing Act.

7-12-94 Filed Application for order mandating Clerk of Courts and stenographer to furnish court records and Transcribed Notes of testimony

APPENDIX E — STATE POST-CONVICTION PETITION DATED JUNE 8, 1987, AND FILED JUNE 12, 1987

PETITION UNDER POST CONVICTION HEARING ACT

COMMONWEALTH OF PENNSYLVANIA

VS

EDWARD R. COSS JR.

* * *

INFORMATION OR INDICTMENT NUMBERS:
CR# 645 Count (1) 1986
CR# 645 Count (2) 1986

I WAS CHARGED WITH THE FOLLOWING CRIMES:
(1) ct. Simple Assault
(2) ct. Institutional Vandalism

1. MY NAME IS: Edward R. Coss Jr.

2. I AM NOW

* * *

(C) ☒ Confined in Rockview State Corr. Inst., Bellefonte, Pa.

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3. I WAS SENTENCED ON January 30, 1987, TO A TOTAL TERM OF (1) to (2) years, COMMENCING ON January 1, 1987, FOLLOWING A

☒ Trial by jury

* * *

4. I AM ELIGIBLE FOR RELIEF BECAUSE OF:

* * *

☒ The infringement of my privilege against self-incrimination under either federal or state law

☒ The denial of my constitutional right to representation by a competent lawyer

* * *

☒ The obstruction by state officials of petitioner's right of appeal

* * *

☒ The abridgement of a right guaranteed by the constitution or laws of this state or the constitution or laws of the United States, including a right that was not recognized as existing at the time of trial if the constitution requires retrospective application of that right

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☒ The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced

☒ The denial of my right to appeal through failure to inform me of this right

5. THE FACTS IN SUPPORT OF THE ALLEGED ERROR(S) UPON WHICH THIS PETITION IS BASED ARE AS FOLLOWS: (State facts clearly and fully; argument, citations, or discussions of authorities shall not be included.)

(A) I know the following facts to be true of my own personal knowledge:

(1). Counsel was ineffective for failure to essentially subpoena witnesses, which could have exonerated the petitioner, or favorably affected the petitioner's defense efforts at vindication. (2). Counsel was ineffective for failure to present a defense of self-defense, when in fact, Counsel "Knew" that the petitioner, had been struck on the head by the affiant, and was in reasonable fear of imminent bodily harm. (3). Counsel was ineffective for failure to allow petitioner to assist in selecting the jury on Voir Dire, thereby, depriving petitioner of his right to a fair and impartial tribunal. (4). Counsel was unconscionably negligent, in failing to advise the petitioner of his 5th amendment right "not to testify" thereby incriminating himself, without, conducting

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a Bighum Colloquy, to assure that commonwealth could not impeach the credibility through prior record.

(B) The following facts were made known to me by means other than my own personal knowledge (Explain how and by whom you are informed):

(6). Trial Court attempted to impede and hamper petitioner's right to appeal, by threats and coercive implications, of threatened bail revocation, if petitioner elected to exercise his right to appeal. (intentional coercive abridgement) (7). Petitioner subjected to the imposition of an illegal sentence, in that trial court relied on impermissible considerations, and used Juvenile record.

(C) In the event my appeal is allowed as requested under #4, the following are the matters which I intend to assert on that appeal (Specify the matters to be asserted if appeal is allowed)

(all of the above) Constitutional violations of the 5th, 6th, and 14th amendments, as well as Article 1 & 9 of the Pa. Const.

6. SUPPORTING EXHIBITS

* * *

(B) I have not attached any affidavits, records or other supporting evidence because I have not received

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the transcripts from my trial/ prior criminal record was used and applied in sentence illicity. Pre-sentence investigation report/ unavailable to petitioner.

7. I HAVE TAKEN THE FOLLOWING ACTION(S) TO SECURE RELIEF FROM MY CONVICTION(S) OR SENTENCE(S):

(A) Direct Appeal

☐ YES ☒ NO

No collateral appeals or appellate relief sought

(B) Previous proceedings in the courts of the Commonwealth of Pennsylvania

☐ YES ☒ NO

N/A

(C) Habeas Corpus or other petitions in Federal Courts

☐ YES ☒ NO

Not applicable

(D) Other legal proceedings

☐ YES ☒ NO

None Criminal/Civil Rights Action pursuant to U.S.C. Title 42/ 1983

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8. FOLLOWING MY ARREST, I WAS REPRESENTED BY THE FOLLOWING LAWYER(S): (Give the lawyer's name and the proceeding at which he represented you.)

Mrs. Roseann McGowan — Lackawanna Public Defender's Office
Represented at Trial by Jury/ Sentencing.

9. THE ISSUES WHICH I HAVE RAISED IN THIS PETITION HAVE NOT BEEN FINALLY LITIGATED OR WAIVED BECAUSE: (State facts.)

Petitioner's allegations are of a Constitutional dimension and consist of intimations by petitioner of procedural due process improprieties, which mandate amelioration and remedy. Hampered/ and deprivational impediments to appellate rights. Constitutional infringement inuring substantial harm and prejudice to petitioner are/ never waived, and are preserved for appellate review in light of the fact that counsel filed no post-verdict motions for defendant, and failed to appeal the case.

10. BECAUSE OF THE FOREGOING REASONS, THE RELIEF WHICH I DESIRE IS:

* * *

(B) ☒ A new trial

(C) ☒ Correction of sentence

(D) ☒ Other relief (specify): evidentiary hearing on the allegations of the ineffective assistance of Counsel issue.

Appendix E

11. (A) I am . . . ☒ NOT ABLE to pay the costs of this proceeding

* * *

(B) My other financial resources are: No pecuniary assets or substantial assets of any kind.

12. (A) ☒ I do not have a lawyer and I am without financial resources or otherwise unable to obtain a lawyer.

(1) ☒ I request the court to appoint a lawyer to represent me. Court appointed / other than public Defender's office

* * *

s/ Edward R. Coss Jr.
(Signature of Petitioner)

* * * *

APPENDIX F — LACKAWANNA COUNTY COURT ORDER DATED JUNE 23, 1987, APPOINTING COUNSEL AND GRANTING RULE TO SHOW CAUSE

Criminal Action No. 86 of 645

COMMONWEALTH OF PENNSYLVANIA

VS

EDWARD R. COSS JR.

ORDER

AND NOW this 23rd day of June, 1987 Upon consideration of the foregoing petition:

* * *

2. ☒ A rule is granted upon the Commonwealth of Pennsylvania to show cause why a hearing should not be granted. The rule is returnable on or before JULY 31, 1987.

3. ☒ The request to proceed as a poor person, without the payment of costs, is ☒ granted.

4. ☒ Upon finding that petitioner is unable to obtain a lawyer Terrence Gallagher, Esq., Jefferson Professional Bldg., 416 Jefferson Ave., Scranton, Pennsylvania, 18510, is appointed to represent him.

5. ☒ The Clerk of this Court is ordered and directed to do the following forthwith:

Appendix F

(a) To serve a copy of this petition and this order upon the District Attorney of Lackawanna County.

(b) To send a copy of this petition and this order to Terrence Gallagher, Esq., the lawyer for the petitioner.

(c) To send a copy of this order to the petitioner.

(d) To send a copy of this petition and order to Roseanne McGowan, Esq. Public Defender's Office.

* * *

BY THE COURT

s/ Cottone, J.

APPENDIX G — COMMONWEALTH'S ANSWER TO STATE POST-CONVICTION PETITION, FILED JUNE 29, 1987

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

86 Cr. 645

COMMONWEALTH OF PENNSYLVANIA

Vs.

EDWARD R. COSS JR.

COMMONWEALTH'S ANSWER TO PETITION
UNDER POST CONVICTION HEARING ACT

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

NOW, Comes the Commonwealth by and through Assistant District Attorney, Andrew J. Jarbola and answers defendant's motion as follows:

1. Admitted

2. Admitted

3. Admitted

4. Denied

Appendix G

5. A. (1) Denied
   (2) Denied
   (3) Denied
   (4) Denied

   B. (6) Denied
   (7) Denied

   C. Denied

6. No answer required

7. A. Admitted
   B. No answer required
   C. No answer required
   D. No answer required

8. Admitted

9. Denied

10. Denied

11. The Commonwealth is unable to confirm or deny this averment.

12. No answer required.

Respectfully Submitted,

s/ Andrew J. Jarbola
ANDREW J. JARBOLA
Assistant District Attorney

APPENDIX H — PENNSYLVANIA SUPERIOR COURT OPINION FILED JUNE 9, 1997, IN LACKAWANNA COUNTY CRIMINAL CASE NO. 1371 OF 1989

Published at *Commonwealth v. Coss*, __ Pa. Super. __, 695 A.2d 831 (1997).

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

EDWARD COSS, JR.,

Appellant.

Submitted March 3, 1997.
Filed June 9, 1997.

* * *

Before McEWEN, P.J., and SCHILLER and OLSZEWSKI, JJ.

SCHILLER, Judge.

Appellant, Edward Coss, Jr., appeals from the judgment of sentence entered by the Court of Common Pleas of Lackawanna County following his conviction of one count each of aggravated assault[1] and simple assault.[2] We affirm.

---

1. 18 Pa.C.S. § 2702.

2. 18 Pa.C.S. § 2701.

Appendix H

FACTS:

On September 11, 1990, following a jury trial, appellant was convicted of the crimes described above. These crimes stem from the beating of Peter Petrovich on August 30, 1989, by a group of five or six men, including appellant. After a trial by jury and his conviction, appellant was sentenced to a term of imprisonment of six to twelve years on the aggravated assault conviction, which was within the standard range of the Pennsylvania Sentencing Guidelines.[3] On direct appeal, this Court vacated the sentence because it was not clear that the presentence report was accurate; concurrently, we remanded the case for resentencing. Commonwealth v. Coss, 449 Pa.Super. 718, 674 A.2d 313 (Memorandum decision, No. 00962 Philadelphia 1995, December 13, 1995). Prior to resentencing, appellant challenged the determination of his prior record and offense gravity scores. The trial court determined that the offense gravity score for the aggravated assault conviction would remain the same at 9, using the sentencing guidelines in effect at the time appellant committed this crime, but reduced the prior record score from 3 to 2, agreeing with appellant that his three prior misdemeanors convictions all arose from the same action, and did not count separately against his prior record, pursuant to 204 Pa.Code 303.7(b), 42 Pa.C.S. § 9721. Thereafter, the trial court resentenced appellant to the same sentence, i.e. six to twelve years imprisonment; this was still within the standard range of the sentencing guidelines. This appeal followed.

---

3. The simple assault conviction merged for purposes of sentencing.

Appendix H

DISCUSSION:

Appellant now raises several issues concerning the correctness of his sentence: (1) whether the trial court abused its discretion in sentencing appellant to six to twelve years imprisonment; (2) whether the trial court failed to state on the record its reasons for the sentence and for total confinement; (3) whether the trial court erred in computing the offense gravity score; and (4) whether the trial court erred in computing the prior record score.

Regarding his first issue, appellant does not have an appeal as of right from the discretionary aspects of his sentence. 42 Pa.C.S. § 9781(b); Commonwealth v. Scullin, 414 Pa.Super. 442, 446-47, 607 A.2d 750, 752 (1992), alloc. denied 533 Pa. 633, 621 A.2d 579 (1992). Two requirements must be met before appellant's challenge to the judgment of sentence will be heard on the merits. Commonwealth v. Koren, 435 Pa.Super. 499, 503, 646 A.2d 1205, 1207 (1994). First appellant must "set forth in his brief a concise statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence." Pa.R.A.P. 2119(f), Id. Second, the appellant must show "that there is a substantial question that the sentence imposed is not appropriate under this chapter." 42 Pa.C.S. § 9781(b); Commonwealth v. Tuladziecki, 513 Pa. 508, 513, 522 A.2d 17, 20 (1987), Commonwealth v. Urrutia, 439 Pa.Super. 227, 236, 653 A.2d 706, 710, alloc. denied 541 Pa. 625, 661 A.2d 873 (1995). This Court has held that a claim of excessiveness of sentence does not raise a substantial question where the sentence is within the statutory limits. Commonwealth v. Jones, 418 Pa.Super. 93, 106, 613 A.2d 587, 593 (1992), alloc. denied 535 Pa. 615, 629 A.2d 1377 (1993) (en banc).

We note that appellant has set forth in his brief a concise statement pursuant to Pa.R.A.P. 2119(f). However, appellant has not raised a substantial question that the sentence imposed was inappropriate, because the sentence imposed was within the statutory recommendation. The guidelines in effect at the time appellant was convicted suggested a minimum sentence of 48-72 months where the offense gravity score is 9 and the prior record score is 2. Appellant was sentenced to 72-144 months, which, as appellant acknowledges, was within the applicable range. Appellant argues that the trial court abused its discretion by sentencing him to the highest sentence possible under the standard range. Such an argument does not raise a substantial question under Commonwealth v. Tuladziecki, supra, and therefore appellant's argument is not cognizable.

Appellant's next issue is that the trial court failed to adequately explain its reasons on the record for the sentence and for the imposition of total confinement. This issue is reviewable:

> Although a claim that the trial court failed to provide reasons for its sentence technically involves the discretionary aspects of sentencing, see Commonwealth v. Smicklo, 375 Pa.Super. 448, 544 A.2d 1005 (1988) (en banc), the trial court has no discretion in determining whether or not to place such reasons on the record. Rather, the Sentencing Code provides, in pertinent part, that "[i]n every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in

> open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 Pa.C.S. § 9721(b).

Commonwealth v. Egan, 451 Pa.Super. 219, 224, 679 A.2d 237, 239 (1996).

Thus, a trial court is required to state its reasons for the sentence on the record. 42 Pa.C.S. § 9721(b). This requirement can be satisfied by the trial court indicating, on the record, that it has been informed by a presentence report. Commonwealth v. Devers, 519 Pa. 88, 546 A.2d 12 (1988). A failure to provide the reasons for the sentence imposed constitutes reversible error requiring resentencing. Commonwealth v. Egan, supra. In addition, 42 Pa.C.S. § 9725 requires the trial court to state its reasons for imposing a sentence of total confinement:

> The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because:
>
> (1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime;
>
> (2) the defendant is in need of correctional treatment that can be

> provided most effectively by his commitment to an institution; or
>
> (3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

42 Pa.C.S. § 9725. See Commonwealth v. Mullen, 321 Pa.Super. 19, 467 A.2d 871 (1983).

In resentencing appellant after the remand, the trial court stated:

> Mr. Coss, in passing sentence on you I've taken into consideration the presentence investigation report . . . I've taken into consideration the statements by Mr. Gertz [appellant's attorney] and the seriousness and nature of the crime involved here, the well being and protection of the people who live in our community, your criminal disposition, your prior criminal record, the possibility of your rehabilitation, and the testimony that I've heard. I was the trial judge and I take into consideration the testimony from the trial.
>
> I think that it's indicative that from your actions that you will continue to break the law unless given a period of incarceration. The record also reflects that shortly after — I think seven of eight months after being discharged from state parole supervision that you committed this offense, and therefore you failed to take advantage of the

> programs and rehabilitation programs that you have been involved in. And the recommendation falls within the standard range of the sentencing guidelines and I find no reason to reduce the defendant's sentence.

N.T., March 27, 1996, pp. 27-29. It is clear from this statement that the trial court stated sufficient reasons for its sentence on the record, including that it relied on a presentence report, and that it considered total confinement necessary because there was a likelihood that appellant would commit another crime if not imprisoned. As such, appellant's argument is meritless.

Appellant's third issue is that the trial court erred in computing the offense gravity score for the aggravated assault crime. Using the sentencing guidelines in effect for this conviction, the trial court determined that the aggravated assault conviction carried an offense gravity score of 9 because serious bodily injury was caused. Appellant argues that he was convicted of only attempting to cause serious bodily injury, which carried with it an offense gravity score of 8.

The Commonwealth argues that this issue, and the next one regarding computation of a prior record score, go to the discretionary aspects of appellant's sentence, and hence are not reviewable as a matter of right. We disagree. "Calculation of a prior record score or an offense gravity score are not matters within the trial court's discretion. Therefore, neither [42 Pa.C.S.] § 9781 nor [Pa.R.A.P.] 2119(f) are implicated in this issue on appeal." Commonwealth v.

Johnson, 421 Pa.Super. 433, 440, 618 A.2d 415, 418-19 (1992). "[W]here the issue on appeal is the improper calculation of a prior record score or an offense gravity score, a direct appeal lies because these are legal questions, and a discretionary review is not appropriate." Id. at 440, 618 A.2d at 419. Therefore, appellant has an appeal as of right to raise these issues.

At trial, appellant was tried and convicted of aggravated assault under subsection (1) of the statute, which provides:

> (a) Offense defined. A person is guilty of aggravated assault if he:
>
> > (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life

18 Pa.C.S. § 2702(a)(1). At sentencing, the trial court rejected appellant's argument that he was convicted of attempting to cause serious bodily injury, as opposed to causing serious bodily injury, stating, "The evidence at the trial — and I was the trial judge on this — is that the victim in this case, Petrovich, suffered bodily injury, serious bodily injury." N.T., March 27, 1996, p. 6. This finding of fact was supported by the evidence produced at trial, which showed that the victim had to undergo plastic surgery as a result of the assault by appellant. See generally Commonwealth v. Caterino, 451 Pa.Super. 42, 678 A.2d 389, alloc. denied, 546 Pa. 652, 684 A.2d 555 (1996). As a result, the trial court's finding that

appellant was convicted of aggravated assault for causing serious bodily injury was supported by the evidence, and, therefore, the trial court did not err in using an offense gravity score of 9 in sentencing appellant.

Appellant's last issue is that the trial court erred in computing his prior record score. The court determined that appellant's prior record score was 2 based on his previous adjudication of delinquency. The Sentencing Guidelines provide for the use of a prior juvenile adjudication of delinquency if "there was an express finding by the juvenile court that the adjudication was for a felony." 204 Pa.Code § 303.5, 42 Pa.C.S. § 9721. If there is such a finding, the juvenile offense is given a prior record score of 2. 204 Pa.Code § 303.6, 42 Pa.C.S. § 9721. Appellant argues that here there was no express finding that this adjudication of delinquency resulted from the conviction for a felony, and therefore his prior record score should have been 0.

In Commonwealth v. Bivens, 337 Pa.Super. 216, 486 A.2d 984 (1985), this Court in interpreting this section stated:

> In our opinion, the Sentencing Commission, when drafting the Guidelines, meant for juvenile adjudications not to be counted in sentencing unless there was no doubt that the juvenile had been adjudicated delinquent for a specific offense that would be a felony if committed by an adult. Otherwise, the juvenile adjudication may be counted against the adult defendant unfairly.

Id. at 220, 486 A.2d at 986. The obvious intent of the Sentencing Guidelines and this Court's holding in Bivens is

that a juvenile adjudication of delinquency should not be counted unless a felony was specifically found to have been committed. In other words, in a situation where a general adjudication was rendered and it may be unclear to a reviewing court whether the trial court actually found that the juvenile had committed a felony as opposed to related misdemeanors, the ambiguity created is construed in favor of the defendant offender. However, this ambiguity does not exist in a situation like the present, where the defendant specifically pleads guilty to the felony. Such a plea obviates the need for the juvenile court to make an express finding.

Appellant was adjudicated delinquent in 1985, after he pled guilty to multiple charges which included a charge of burglary. The learned and well respected trial judge in this case, the Honorable James M. Munley, held that this was a sufficient basis to conclude that appellant was adjudicated delinquent specifically based on the burglary charge. It is clear from the record of the juvenile adjudication[4] that appellant was aware that he was pleading guilty to burglary.[5] Thus, the record is clear that appellant knowingly admitted the commission of a felony before the juvenile court and

---

4. We note that the official record in this case was lost and that our review is based on a reconstructed record supplied by the trial court. Nowhere in that record is there any of the proceedings from the juvenile adjudication, which occurred on October 18, 1985. Instead, our review is based on the transcript of the juvenile hearing supplied by appellant in his reproduced record, which the Commonwealth does not allege is inaccurate.

5. We note that every type of burglary set forth in 18 Pa.C.S. § 3502 constitutes a felony.

that his adjudication of delinquency was based, at least in part, on the commission of a felony. As such, the trial court did not err in finding that appellant was adjudicated delinquent because of a felony, and appellant's argument that his prior record score should be 0 instead of 2 is meritless.

CONCLUSION:

Appellant's argument that the trial court abused its discretion in sentencing him to 6 to 12 years imprisonment does not raise a substantial question regarding his sentence and is not cognizable on this appeal. The trial court did not fail to state sufficient reasons for its sentence and for ordering total confinement. The trial court also did not err in computing the offense gravity score for the aggravated assault conviction, or in computing appellant's prior record score.

Consequently, the judgment of sentence entered by the Court of Common Pleas of Lackawanna County is affirmed.

APPENDIX I — SECOND AMENDED FEDERAL HABEAS CORPUS PETITION, FILED NOVEMBER 7, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO: 1:CV-94-1481
(Judge Caldwell)
(Magistrate Judge Blewitt)

EDWARD R. COSS, JR.,

Petitioner

v.

LACKAWANNA COUNTY DISTRICT ATTORNEY and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents

SECOND AMENDED HABEAS CORPUS PETITION

AND NOW comes the Petitioner, Edward R. Coss, Jr., by his attorney, Melinda C. Ghilardi, Esquire, First Assistant Federal Public Defender, and files the following Second Amendment to Coss' original Petition for Writ of Habeas Corpus which was filed on September 15, 1994. The Petition was also amended on November 29, 1995. The Petition and Amended Petition are incorporated herein by reference in their entirety.

Appendix 1

1. The convictions which Coss challenges in the instant Habeas Corpus Petition are for institutional vandalism, in violation of 18 Pa. C.S.A. § 3307(a)(3), criminal mischief, in violation of 18 Pa. C.S.A. § 3304(2) and simple assault, in violation of 18 Pa. C.S.A. § 2701(1). *Commonwealth v. Coss*, No. 86-645, Lackawanna County Court of Common Pleas.

2. On January 30, 1987, Coss was sentenced on the above-stated offenses as follows: Six (6) months to one (1) year in a state institution on the institutional vandalism charge; the criminal mischief charge merged with the institutional vandalism charge for sentencing purposes; and six (6) months to one (1) year in a state institution on the simple assault charge, to run consecutive to the institutional vandalism sentence.

3. Coss avers that he is being unlawfully held on the following grounds:

(1) Coss was denied his Sixth (6th) Amendment to effective assistance of trial counsel on the following grounds:

(A) Trial counsel failed to subpoena any of the witnesses Coss requested.

(B) Trial counsel failed to present the defense of self-defense to the simple assault charge as requested by Coss.

(C) Trial counsel proceeded with jury selection in Coss' absence and then

failed to permit him to participate when he arrived, resulting in the empaneling of two (2) jurors who were adverse to Coss and his family.

(D) Trial counsel failed to confer with Coss during trial.

(E) Trial counsel failed to file post-trial motions, as well as an appeal as requested by Coss.

(2) Coss was denied his Fourteenth (14th) Amendment due process rights when the trial court erroneously imposed an illegal sentence on the following grounds:

(A) The trial court erred when it considered inaccurate information at sentencing, i.e., a 1984 aggravated assault conviction that had been dismissed.

(B) The trial court erred when it considered Coss' prior juvenile convictions in imposing sentence in this misdemeanor case.

4. The above stated issues are meritorious and demonstrate that Coss was denied his due process right to a fair sentencing hearing and his Sixth (6th) Amendment right to effective assistance of counsel. Thus, Coss is entitled to a new trial

and sentencing hearing with regard to his institutional vandalism, criminal mischief, and simple assault convictions.

5. The issues presented in the within Second Amended Habeas Corpus Petition involve factual matters, and as such, cannot be decided by this Court without the benefit of an evidentiary hearing.

6. The within Second Amended Habeas Corpus Petition is presented in compliance with this Court's Order of October 23, 1996.

WHEREFORE, the Petitioner, Edward R. Coss, Jr., respectfully requests that this Honorable Court consider this Second Amendment to his original Petition for Writ of Habeas Corpus and that the Court conduct an evidentiary hearing with regard to same.

Date: November 7, 1996

Respectfully submitted,

s/ Melinda C. Ghilardi
Melinda C. Ghilardi, Esquire
First Assistant
Federal Public Defender
Attorney for Edward R. Coss, Jr.

116 N. Washington Avenue,
Suite 2C
Kane Professional Building
Scranton, PA 18503
(717) 343-6285

APPENDIX J — COMMONWEALTH'S AMENDED ANSWER TO SECOND AMENDED FEDERAL HABEAS CORPUS PETITION, FILED DECEMBER 26, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO: 1:CV-94-1481
(Judge Caldwell)
(Magistrate Judge Blewitt)

EDWARD R. COSS, JR.

Petitioner

VS.

LACKAWANNA COUNTY DISTRICT ATTORNEY and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

Respondents

AMENDED ANSWER TO SECOND AMENDED HABEAS CORPUS PETITION

AND NOW comes the Respondents, by and through its attorney, William P. O'Malley, Assistant District Attorney and Lisa Gillick, Assistant District Attorney and answers the Petitioner's Second Amended Habeas Corpus Petition as follows:

1. Admitted.

2. Admitted.

Appendix J

3. (1)(a-e) Respondent is lacking sufficient knowledge or information to answer paragraph 3(1), all of paragraph 3(1) is therefore denied and strict proof is demanded.

3. (2)(a-b) Denied.

4. The matters set forth in paragraph 4 are mere conclusions of law for which no answer is possible or required, but in any event, said matters are denied.

5. Denied. What is required is not an evidentiary hearing, but more explicit pleading by Petitioner.

6. Respondent is lacking sufficient knowledge or information to answer paragraph 6 and it is therefore denied.

WHEREFORE, the Respondents respectfully request that this Honorable Court deny the defendant's Petition for Habeas Corpus.

Respectfully submitted,

s/ William P. O'Malley
William P. O'Malley
Assistant District Attorney
Lackawanna County Courthouse
200 N. Washington Avenue
Scranton, PA 18503
Atty I.D. # 58520

s/ Lisa Gillick
Lisa Gillick
Assistant District Attorney
Atty I.D. # 69785

NOV 24 2000

No. 99-1884

Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

IN THE

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

EDWARD R. COSS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

WILLIAM P. O'MALLEY*
Assistant District Attorney
EUGENE M. TALERICO
First Assistant District Attorney
ANDREW J. JARBOLA, III
District Attorney
LACKAWANNA COUNTY DISTRICT ATTORNEY'S OFFICE
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* *Counsel of Record* *Attorneys for Petitioners*

163650

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QUESTION PRESENTED

Does the custody requirement of the federal habeas corpus statute preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody?

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1. Recent congressional enactments which purport to place a strict one-year time limitation upon applicants for federal habeas relief tend strongly to support the proposition that the answer to the question left open by *Melang v. Cook* should be that a habeas petitioner does not remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction has been or might be used to enhance the sentences imposed for any subsequent crime of which he is convicted with the sole possible exception of cases wherein the record discloses that there was a complete denial of defense counsel in the prior proceeding. 10

2. Through analysis of the error, or not, in the rationale upon which the court of appeals grounded its decision, there emerges an independent array of reasons why the custody requirement of the federal habeas corpus statute should be held to preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody. 15

Conclusion 25

TABLE OF CITED AUTHORITIES

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals For the Third Circuit, filed February 29, 2000, which reversed the United States District Court for the Middle District of Pennsylvania and conditionally granted the petition for habeas corpus is reported at 204 F.3d 453 (3d Cir. 2000) and is unofficially reported at 2000 WL 225898 (3d Cir.(Pa.), Feb 29 2000) (No. 98-7416). A copy of said opinion is set forth in the Appendix to the Petition for a Writ of Certiorari [Pet. App.] on pages 1a to 49a

A previous opinion entered on June 28, 1999 by the United States Court of Appeals for the Third Circuit, would have reversed the United States District Court for the Middle District of Pennsylvania, but for different reasons, and would have conditionally granted the petition for habeas corpus. Said opinion has not been officially published, but is unofficially reported at 1999 WL 495123 (3d Cir.(Pa.), Jun 28, 1999) (No. 98-7416), Pet. App. 50a-93a.

By order dated July 30, 1999, rehearing was granted, the previous opinion of June 28, 1999 (Appendix pages 50a to 93a) was vacated and the cause was listed for rehearing *en banc*, resulting in the opinion entered on June 28, 1999 (Appendix pages 1a to 49a). This order dated July 30, 1999 has not been officially published but is unofficially reported at 1999 WL 566730 (3d Cir.(Pa.), Jul 30, 1999) (No. 98-7416), Pet. App. 94a.

The orders and memorandum opinion of the United States District Court for the Middle District of Pennsylvania denying the instant habeas petition are unpublished, Pet. App. 95a to 121a.

STATEMENT OF JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241(c)(3), which provides:

> The writ of habeas corpus shall not extend to a prisoner unless —
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Edward R. Coss, Jr. brought this habeas corpus action pursuant to 28 U.S.C. § 2254. The United States Court of Appeals for the Third Circuit reversed the District court's denial of relief and conditionally granted habeas corpus relief by opinion and order entered on February 29, 2000. Rehearing of such judgment was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Respondent is a multiple criminal offender whose extensive criminal history was recognized and detailed by the Court of Appeals, Pet. App. 24a-26a. These habeas corpus proceedings raise claims of constitutional error based upon isolated segments of that criminal history upon which respondent relies to support for his federal habeas contentions that:

(a) because one of his former convictions, a 1986 conviction for simple assault, for which he is no longer incarcerated or under any parole restraint, was tainted by constitutional infirmity arising as the result of ineffective assistance of trial counsel, and

(b) because that former 1986 conviction for simple assault was improperly considered when he was sentenced for a subsequent offense, the term of incarceration for the subsequent offense violates respondent's constitutional rights.

The former conviction occurred in 1986 following a jury trial for simple assault. It resulted in a two year prison sentence which began in 1986 and ended in 1988 at which

time respondent was released from prison. Thus, long before the present habeas proceedings began, respondent was no longer serving any sentence for the 1986 simple assault conviction; the sentence for that conviction had been fully served.

Subsequently, in 1990, respondent was tried and convicted in the Pennsylvania courts for an offense which occurred following his release from prison and which was entirely unrelated to the 1986 simple assault conviction for which his state prison sentence had already been completed. Respondent contends (and the court of appeals, on a basis which is not entirely clear, Pet. App. 10a-11a, agrees with such contention) that his current sentence which he presently is serving for the unrelated 1990 conviction was enhanced by reason of his long-since-completed 1986 conviction. Based upon respondent's further claim that the trial resulting in his 1986 conviction was tainted by ineffective assistance of trial counsel, respondent argues that the sentence for his 1990 conviction was adversely and unconstitutionally affected by the 1986 simple assault conviction, entitling him to federal habeas relief.

Respondent's federal habeas corpus proceedings were commenced by a *pro se* petition filed September 15, 1994, J.A. 1a [dkt #1]. On July 13, 1995, the Federal Public Defender was appointed to represent respondent, J.A. 8a [dkt #32], and on November 29, 1995 a counselled amendment to the habeas petition was filed on respondent's behalf. J.A. 11a [dkt #44]. A second amended habeas petition was filed by respondent's counsel on November 7, 1996. J.A. 19a [dkt #72]. Like its predecessor pleadings this second amendment challenged only respondent's 1986 conviction, making no mention of the 1990 conviction or sentence.

The United States District Court for the Middle District of Pennsylvania denied the amended petition finding that although respondent's counsel in the trial leading to the 1986 conviction rendered objectively deficient performance, no prejudice had been shown. Pet. App. 95a-96a. The court explained (Pet. App. 105a-108a.) that it had jurisdiction to entertain the challenge to the 1986 conviction because "Coss maintains that his current sentence [based on charges unrelated to the 1986 convictions] was adversely affected by the 1986 convictions because the sentencing judge considered these allegedly unconstitutional convictions in computing Coss' present sentence." Pet. App. 105a-106a.

The court of appeals disagreed with the district court's conclusion that prejudice had not been shown and reversed with instructions to the district court that it order a writ of habeas corpus to issue conditioned upon Coss being resentenced without consideration of the 1986 conviction. Pet. App. 51a. The court of appeals subsequently vacated its previous opinion and granted rehearing en banc. *Id.* at 94a.

On rehearing the court reversed the district court on the same grounds as the previous opinion had, but changed the type of relief to be granted. With respect to its jurisdiction, the court interpreted *Maleng v. Cook*, 490 U.S. 488 (1989), as holding that a petitioner "satisf[ies] the 'in custody' requirement for federal habeas corpus jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction." Pet. App. 12a. The court based its finding that it had jurisdiction to order the writ upon Coss' contention "that the sentence for his 1990 conviction was adversely affected by the 1986 simple assault conviction." *Id.* at 12a-13a. The court excused the exhaustion requirement because

Coss' PCHA petition had been pending for seven years, *Id.* at 13a, and also recognized that Coss had not "presented the Pennsylvania state courts with his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990," but concluded that collateral relief for that sort of claim was not available under the PCHA or other state post-conviction remedies, thereby excusing the exhaustion requirement. *Id.* at 13a-14a.

On the matter of relief the court of appeals stated that the "normal relief we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding." Pet. App. 22a. The court observed that Coss could not be "freed" from his 1986 conviction because he had already served his time. Rejecting Coss' contention that the only available remedy was to require the state to re-sentence him under the 1990 conviction, *id.* at 23a, the court extended to the state the option of re-trying Coss for the 1986 offense. *Id.* at 28a. The court explained that Coss would have to be resentenced under this 1990 conviction in any event but stated that "comity requires us to afford the Commonwealth the opportunity to cure the original constitutional defect." The court expressed no opinion as to whether Pennsylvania law permits such a retrial. *Id.* at 28a-29a & n.14. Two judges dissented and two judges concurred in part and dissented in part. This Court granted certiorari on October 10, 2000.

SUMMARY OF ARGUMENT

Petitioners' argument has been divided in two parts.

In the first part of argument, petitioners seek to demonstrate that recent amendments to the federal habeas statute do not suggest any intention by Congress that the words of the "custody" provisions should be accorded any meaning other than their plain meaning. The class of persons who are persons "in custody" means just what it says. If the Congress had intended that the class should be expanded to include a greater breadth of persons it would have provided for actions by persons claiming to have been "convicted" in violation of the Constitution rather than the more limited class of persons "in custody" in violation of the Constitution.

The recent amendments to the federal habeas statute were enacted by Congress well after this Courts decisions in *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926, 104 L. Ed. 2d 540 (1989) and *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). Both *Maleng* and *Custis* contain language which might be interpreted as creating exceptions to the "custody" requirement of the habeas statute, yet Congress made no effort to engraft any such exceptions into the amendment. The failure of Congress to have done so suggests an intention by Congress to preclude any challenge upon a fully expired conviction for which the prisoner is no longer in custody that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

In the second part of their argument petitioners approach the question presented in these proceedings from a different perspective.

By pointing out, and analyzing in some detail, what petitioners believe to be the plain error inherent in the analytical approach undertaken in this case by the court of appeals, there emerges a fresh set of reasons, each independent of the other and additional to congressional intent, for why the question presented in these proceedings should be answered in the manner urged by petitioners. This fresh set of reasons, in the order developed, include the following:

The court of appeals, while paying lip service to the holding of *Maleng* actually made its pivotal ruling in this case in a manner which misinterpreted and is in diametric opposition to the actual holding in *Maleng*.

In its analysis of *Maleng*, the court of appeals also appears to have overlooked at least one unique circumstance of Mr. Maleng's case which is not a circumstance here; Maleng was "in custody" by reason of an outstanding detainer which had been lodged against him. Additionally Mr. Maleng's sentence, unlike Mr. Coss' sentence, was not fully expired; Maleng hadn't even yet begun to serve the sentence in question and would not begin to serve it until after the conclusion of his present unrelated period of incarceration.

A second aspect of the decision by the court of appeals which petitioners believe contributed to error in the decision of that court was the court of appeals' unwillingness to be guided by this Court's post-*Maleng* decision of *Custis*. Rather than heeding any of the interpretive aspects of *Custis* which might have been helpful, the court of appeals rested its decision upon its own "collateral consequences" rule developed for the Third Circuit in *Young v. Vaughn*, 83 F.3d

72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence). Petitioners argue that the court of appeals also erred in viewing its rule of "collateral consequences" as being buttressed by *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972).

Four additional and independent reasons for answering the question presented in these proceedings in the manner urged by petitioners emerge when the court of appeals' analysis of *Tucker* is closely examined:

First of all, in *Tucker* comity was not the important consideration which it is here.

Secondly, *Custis* held that *Tucker* is only relevant (constitutionally) when a violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 1252 (1963) is established, which is not the case here.

In the third place, *Tucker* predated *Maleng*, which viewed the question presented as left open. Because the *Maleng* Court plainly did not believe that *Tucker* already had resolved the question presented, the court of appeals should not have done so either.

In the fourth place, the *Tucker* case was brought by a federal prisoner under the provisions of 28 U.S.C. § 2255 whereas here the habeas petition was brought by a state prisoner under the provisions of 28 U.S.C. § 2254.

Petitioners conclude this aspect of their analysis with the observation that because the ultimate result in *Tucker*

was dependent, almost entirely, upon the absence of any state officials as parties to the *Tucker* case (an obviously distinguishing factor) the vitality of the "collateral consequences" rule promulgated in *Young v. Vaughn*, *supra*, is not supported by *Tucker* in any event, finally pointing out that the "collateral consequences" rule, as announced in *Young v. Vaughn*, *supra*, is plainly at variance not only with the rationale expressed in *Custis* but also with the holding of *Maleng*.

ARGUMENT

1. **Recent congressional enactments which purport to place a strict one-year time limitation upon applicants for federal habeas relief tend strongly to support the proposition that the answer to the question left open by *Malang v. Cook* should be that a habeas petitioner does not remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction has been or might be used to enhance the sentences imposed for any subsequent crime of which he is convicted with the sole possible exception of cases wherein the record discloses that there was a complete denial of defense counsel in the prior proceeding.**

The pertinent statutes, 28 U.S.C. §§ 2241 and 2254, do not expressly authorize collateral attacks on expired state sentences used in later sentencings. Instead the statutes provide for an action by a person "in custody in violation of the Constitution or laws or treaties of the United States."

Obviously, Congress intended the "custody" requirement to have its plain meaning, thereby restricting the class of

cases to which habeas jurisdiction would extend; otherwise it would have provided for an action by a person claiming he was "convicted" in violation of the Constitution. If the "custody" requirement instead allows challenges to sentences on which a prisoner is not in custody, but which were simply used in a subsequent sentencing proceeding, then the plain meaning of the words used by Congress is being ignored and the statutory language has virtually no effect.

Recent changes[1] in the federal habeas statute emphasize the point. After long concern about stale attacks on state convictions, Congress has now acted to require a prisoner to seek federal habeas review within one year after his conviction becomes final. The recent changes to the federal habeas statute do not directly suggest that Congress intended any exceptions to the statutory provisions as amended.

The omission of Congress to write any exceptions[2] into the newly-created one year period of limitations, coupled

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1. 28 U.S.C. § 2244(d)(1) as amended Apr. 24, 1996, Pub. L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220 now provides: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

2. As Chief Justice Marshall first noted, unlike the common law, where the court's power to issue a habeas writ was an inherent one, in the American system, judicial authority to grant the writ flows solely from the statutory grant. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 2 L. Ed. 554 (1807). If it is the Congress which has the sole power to authorize the courts to issue writs of habeas corpus, it would seem beyond question that the Congress also has the power to place reasonable restrictions upon the time within which, in any given case, the courts' authority to issue such writs must be invoked by aggrieved prisoners.

with the failure of Congress to create expanded exceptions as expressed by this Court in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994) ("Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. This we decline to do.") does not inveigh in favor of excluding ineffectiveness claims from the sweep of the Congressional intent to limit the use of habeas corpus to claims less than one year old.

The holding announced by the Court, in *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926, 104 L. Ed. 2d 540 (1989) was straight-forward and direct:

> The question presented by this case is whether a habeas petitioner remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction will be used to enhance the sentences imposed for any subsequent crime of which he is convicted. We hold that he does not.

This language seems to make it clear that a state prisoner does not remain "in custody" under a conviction after the sentence imposed for it has fully expired merely because of the possibility [or even the actuality[3]] that the prior sentence

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3. The Court observed that

> [s]ince almost all states have habitual offender statutes, and many states provide . . . for specific enhancement of subsequent sentences on the basis of prior

(Cont'd)

will be used to enhance the sentence imposed for any subsequent crimes of which he is convicted. Nevertheless the opinion then states that it "express[es] no view" on the extent to which an expired conviction could be challenged in the context of an attack on a current sentence.

What remains indefinite is how the Court's holding in *Maleng* is distinct from the point on which it purports to express no view. The only apparent reason for the prisoner in *Maleng* to have challenged an expired sentence was to escape a current sentence that was based on the expired sentence.

There is little room to suppose, much less to argue, that *Maleng v. Cook*, *supra*, extended the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. If *Maleng* had had the effect of so extending the right to attack collaterally prior convictions used for sentence enhancement, it would have been an anomaly for the Court, only five years later, in *Custis v. United States*, *supra*, to announce its refusal to acknowledge that the right of collateral attack had been so extended.

(Cont'd)

> convictions, a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas.

490 U.S. at 492. The viability of the Court's observation as just quoted in light of the one year time limitation imposed by the 1996 amendment to 28 U.S.C. § 2244(d)(1) may deserve the Court's consideration.

Because the Congress has acted (28 U.S.C. § 2244(d)(1) as amended), post-*Maleng* and post-*Custis*, to sharply limit the power of the courts in issuance of writs of habeas corpus in cases involving state court judgments to instances where the writ is applied for within one year, the inference should be strong that Congress, having explicitly limited collateral attacks to "fresh" state court sentences, intended that collateral attacks on "stale" state court sentences should not be countenanced as providing any basis for habeas relief.

The decision of the Third Circuit here, as well as the decisions of other circuits which do not regard *Custis* as having answered the question left open by *Maleng*, tend to create an enormous loophole in the amended statute by allowing review of expired sentences so long as the prisoner alleges a connection between present incarceration on a new offense and the prior conviction. If "the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*" is not, henceforth, uniformly limited as it was limited in *Custis v. United States*, *supra*, whatever benefits Congress hoped would flow from the 1996 amendment requiring expeditious review of state criminal proceedings will be largely illusory.

Although *Maleng* did not expressly preclude such a challenge it now seems apparent, in light of *Custis* and the habeas statute itself (particularly through the congressional expression inherent in the amendment imposing a one year limitation) that the answer to the question presented in these proceedings should be that under all circumstances the custody requirement of the federal habeas corpus statute precludes a challenge upon a fully expired conviction for which the prisoner is no longer in custody that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

2. Through analysis of the error, or not, in the rationale upon which the court of appeals grounded its decision, there emerges an independent array of reasons why the custody requirement of the federal habeas corpus statute should be held to preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

Although the question of whether the specific line of reasoning utilized by the court of appeals was or was not erroneous may usually be of secondary importance to any effort to answer the question presented in proceedings such as these, analysis of the circuit court's reasoning in this instance highlights additional basis for concluding that the federal habeas statute should, under all circumstances be held to preclude a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

Unless the Court determines, in these proceedings, to depart substantially from the holding it reached in *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926, 104 L. Ed. 2d 540 (1989), the decision of the Court of Appeals for the Third Circuit should be reversed for the reason, independent of all others, that the pivotal ruling made in this case by the court of appeals misinterprets the holding of *Maleng v. Cook*, *supra*. This misinterpretation is in diametric opposition to the actual holding of *Maleng*.

The court of appeals, ruled that "A petitioner does, however, satisfy the 'in custody' requirement for federal habeas jurisdiction when he asserts a challenge to a sentence

he is currently serving that has been enhanced by the allegedly invalid prior conviction. [citing *Maleng* at 493]" (Pet. App. at 12a). The holding of the Supreme Court in *Maleng* is not to be found at page 493, [490 U.S. at 493] as cited by the Court of Appeals. The *Maleng* holding, to which the Third Circuit opinion made only passing reference (Pet. App. at 12a), is found at page 492 [490 U.S. at 492] where the Supreme Court stated:

> The question presented by this case is whether a habeas petitioner remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction will be used to enhance the sentences imposed for any subsequent crime of which he is convicted. We hold that he does not.

Id., 490 U.S. at 492.

This holding, as just quoted from the *Maleng* opinion, is exactly the opposite of that which, in its quoted pivotal ruling, the Court of Appeals for the Third Circuit suggests the *Maleng* holding to have been. The quoted pivotal ruling of the Court of Appeals carries the implication, as applied to the facts of Coss' case, that despite any intervening unconditional release the collateral consequence of sentence enhancement is sufficient to render an individual "in custody" for purposes of an attack on an "allegedly invalid prior conviction." Such an implication is not in blatantly direct conflict with this Court's *Maleng* opinion, but the implication inherent in the Court of Appeals' ruling strongly appears to conflict with important recitals that immediately preceded the quoted holding in *Maleng*.

In *Maleng*, at the conclusion of the Court's analysis of *Carafas v. LaVallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968) the *Maleng* opinion set forth the following observations concerning *Carafas*:

> . . . We went on to say, however, that an unconditional release raised a "substantial issue" as to the statutory "in custody" requirement. [citation omitted]. While we ultimately found that requirement satisfied as well, we rested that holding *not* on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed. *Ibid.* The negative implication of this holding is, of course, that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.

(Italics in original) *Maleng v. Cook*, *supra*, 490 U.S. at 492.

Unless one totally ignores the "negative implication" which the *Maleng* opinion, as just quoted, read into its *Carafas* analysis, the ruling of the Court of Appeals simply cannot be squared with the holding of *Maleng*. Relief from the "collateral consequence" of sentence enhancement arising solely by virtue of a completely expired prior sentence was the only relief which the Court of Appeals sought to bestow upon Coss.

The result in *Maleng*, which appears to differ significantly from the Court's page 492 holding (490 U.S.

at 492) is to be found at page 493 (490 U.S. at 493). It is upon the page 493 result rather than upon the Supreme Court's page 492 holding that the Third Circuit court seems to have relied.

A unique circumstance of Maleng's case (a circumstance not present in Coss' case) which enabled the Court to reach a result differing conspicuously from the Court's quoted holding was the fact that Mr. Maleng had been convicted by the State of Washington and sentenced in 1978 to a term in the Washington state prison which, at the time of the Court's *Maleng* decision, he had not yet begun to serve. Utilizing the rationale of *Peyton v. Rowe*, 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968) ("a petitioner who was serving two consecutive sentences imposed by the Commonwealth of Virginia could challenge the second sentence which he had not yet begun to serve"), the Court explained that although Mr. Meleng had not yet begun to serve his 1978 state court sentence, a detainer[4] had placed against him by the State of Washington

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4. The fact of this detainer was also vitally important to the result reached by the Court in *Maleng*, *supra*.

In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 93 S. Ct. 1123, 35 L. Ed. 2d 443 (1973) the Court, as it duly explained in its *Maleng* opinion, had held

> that a prisoner serving a sentence in Alabama, who was subject to a detainer filed with his Alabama jailers by Kentucky officials was "in custody" for the purpose of a habeas attack on the outstanding Kentucky charge upon which the detainer rested. We think that *Braden* and *Peyton* together require the conclusion that respondent in this case was "in custody" under his 1978 state sentences at the time he filed.

Maleng v. Cook, *supra*, 490 U.S. at 493, 109 S. Ct. at 1926, 104 L. Ed. 2d 540.

(Cont'd)

with the federal authorities "to ensure that at the conclusion of [Maleng's] federal sentence he [would] be returned to the state authorities to begin serving his 1978 state sentences." *Maleng v. Cook*, *supra*, 490 U.S. at 493.

It seems evident that three factors enabled the Court, in *Maleng*, to reach a *result* which was at such conspicuous variance with the Court's *holding*, quoted earlier in this brief. Those three factors were:

a.) the 1978 state sentences which Mr. Meleng had not yet begun to serve but which he would be obliged to serve at the conclusion of his federal sentence,

b.) the detainer [see note 4 ante] which furnished the essential link between Mr. Meleng's then-present federal custody and the yet-to-be-served state custody which would immediately follow his federal custody and,

c.) the incidental fact that Mr. Maleng's habeas petition was a pro se petition which the Court treated with greater deference.

None of those three factors are present in the case of Mr. Coss.

Mr. Coss' 1986 conviction for simple assault is as final as it can be. Not only is all appeal concluded, but the sentence

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(Cont'd)

It appears to have been the detainer that provided the "connection" which, without interruption of custody, would link Mr. Braden's then present and immediate Alabama custody to the prospective custody inherent in the Kentucky sentence which he had not yet begun to serve.

has been completely served. The prisoner desires to revisit it now only because he chose to continue his criminal conduct, and his past has caught up with him.

Because the sentence based upon Coss' 1986 conviction has been completely served and Coss was "out on the streets" for a time following his 1986 incarceration, there is no detainer or any other similar custodial circumstance to provide the essential link or continuum between his 1986 sentence and his present custody.

Unlike Mr. Maleng's petition, Coss' petition is not pro se. Although Coss initially did file a pro se petition the matter is presently before the court on his second amended counselled petition.

Because none of the three factors which enabled the Supreme Court in *Maleng* to reach a result contrary to the Court's *Maleng* holding are present in the case of Mr. Coss, the reliance which the Court of Appeals (Pet. App. at 12a) placed upon the *result* in *Maleng* is, as a matter of law, clearly erroneous because such reliance is contrary to the *holding* of *Maleng*. On this basis alone, the decision of the Court of Appeals should be reversed.

There are, however, additional grounds which support reversal of the decision of the Court of Appeals. Principal among these additional grounds is the unwillingness of the Court of Appeals to be guided by the teachings of this Court as found in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

Petitioner urged the Third Circuit, in the brief filed in that court, to be guided by the rationale of *Custis* in reaching

its decision[5], but the Third Circuit ignored *Custis* entirely. Instead (Pet. App. 12a-13a) the Third Circuit hinged this crucial aspect of its decision on its own "collateral consequences" rule developed for the Third Circuit in *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence). The Third Circuit Court also (Pet. App. 12a) viewed its decision as being buttressed by *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). Four separate problems inhere in efforts to buttress *Young v. Vaughn* with *Tucker*.

In the first place, in *United States v. Tucker*, comity was not a consideration; comity is an important consideration here. Moreover here, unlike in *Tucker*, state officials and state sentencing procedures are closely implicated. The *Tucker* case presented a situation where the Ninth Circuit court, in an appropriate exercise of its supervisory powers over a subordinate federal court of the Ninth Circuit, had simply ordered the district court to sentence a federal prisoner on a federal conviction without reference to an invalid state court conviction. The reasoning employed by Judge Aldisert in an earlier opinion which he filed in this case is instructive to the point:

> The teachings of Tucker do not constitute an appropriate analogue to this case or any other

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5. The circumstance that Mr. Coss' 1986 sentence had been completely served, and Coss released from any custody long before he filed his federal habeas petition presents a case even stronger than that of Custis, who was still on state probation under the enhancing sentence when he was sentenced for his federal crimes. *See* 1994 WL 663719 at *9. The fact that habeas review was still available for the defendant in *Custis* does not mean that it is available for prisoners who wish to resurrect attacks on already expired cases.

> federal habeas case brought under §2254. United States v. Tucker by caption and by content was not a habeas case brought under §2254 based on a state conviction; the defendant there was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. *This is a distinction with a fundamental difference.*

(Italics supplied).

* * *

> . . . In bringing his action, Tucker was attacking a federal sentence . . . that had been enhanced on the basis of invalid state court convictions. . . . Because the Court had no state officers as petitioners or respondents before it, the court lacked power or authority to give the option to a state court . . . to retry the defendant.

* * *

> . . . [T]he Court had no alternative other than to order that the defendant be resentenced on the federal conviction without reference to the invalid state court convictions.

(Pet. App. 29a-30a).

The quoted reasoning reinforces the conclusion that in *Tucker* the Ninth Circuit Court, as was its entitlement — perhaps its obligation — was simply exercising its "supervisory power" over the conduct of a federal district court in its jurisdiction. *See United States v. Hastings*, 461

U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (In the exercise of its supervisory powers, federal court may, within limits, formulate procedural rules not specifically required by the Constitution or Congress; the purposes underlying use of supervisory powers are to implement a remedy for violation of recognized rights, to preserve judicial integrity by assuring that a conviction rests on appropriate considerations validly before the jury, and to deter illegal conduct.).

In the second place, *Custis* held that *Tucker* is only relevant (constitutionally) when a *Gideon* violation is established. That, obviously, is not the case here.

As a third reason, it should be remembered that *Tucker* predated *Maleng*, which viewed the question presented as left open; the *Maleng* Court, therefore, plainly did not believe that *Tucker* already had resolved the question presented.

The fourth reason why *Tucker* ought not be given effect here is that the *Tucker* case was brought by a federal prisoner under the provisions of 28 U.S.C. § 2255. Here the habeas petition was brought by a state prisoner under the provisions of 28 U.S.C. § 2254.

The court of appeals interprets *Tucker* (Pet. App. 12a) as implicitly applicable to habeas cases brought under § 2254 based on a state conviction. In so doing, the court ignores the distinguishing factor that the defendant in *Tucker* was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. In such process the court seems to have ignored that which Judge Aldisert had but recently declared was "a distinction with a fundamental difference." It appears that a similar distinction was found to be of no

consequence in *Maleng v. Cook*, but in *Maleng* this Court, as has been pointed out earlier in this brief, justified the result through the observation (490 U.S. at 493) that the State of Washington had placed a detainer with the federal authorities to ensure that at the conclusion of Maleng's federal sentence he would be returned to the state authorities to begin serving his 1978 state sentences.

Viewed in the context thus established, *Tucker* cannot fairly be regarded (*Maleng v. Cook*, notwithstanding) as constituting a holding by this Court that ". . . a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional [state court] conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence." (Pet. App. at p.12a).

As a consequence of the foregoing analysis, it can be seen that the vitality of the Third Circuit "collateral consequences" rule, as promulgated in *Young v. Vaughn*, 83 F3d 72, 78 (3d Cir. 1996) (holding that a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence) is not supported by *Tucker* if the expired conviction is a state court conviction. Arguably, if the "housekeeping" aspects of *Tucker*, arising under the principles set forth in *United States v. Hastings*, *supra*, are considered, the vitality of the "collateral consequences" rule promulgated in *Young v. Vaughn*, *supra*, are not supported by *Tucker* in any event.

Moreover, it has been shown that the "collateral consequences" rule, as announced in *Young v. Vaughn*, *supra*, is plainly at variance not only with the rationale expressed in *Custis* but also with the *holding* of *Maleng*.

CONCLUSION

The judgment of the court of appeals should be reversed because Coss was not "in custody" under the judgment he sought to attack at the time he filed his habeas petition. The answer to the question presented by these proceedings should be that the custody requirement of the federal habeas corpus statute precludes, under all circumstances, any challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody?

Respectfully submitted,

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In The

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

vs.

EDWARD R. COSS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

SHOULD A STATE PRISONER BE DEEMED "IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES" WHEN HE CHALLENGES THE SENTENCE HE CURRENTLY SERVES ON THE GROUND THAT IT WAS AFFECTED BY A PRIOR CONVICTION THAT IS CONSTITUTIONALLY UNRELIABLE DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL?

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OPINIONS BELOW

The *en banc* opinion of the court of appeals is reprinted in the Petition for Writ of Certiorari at page 1a, and is published at 204 F.3d 453. The unpublished memorandum and opinion of the district court is reprinted in the Petition for Writ of Certiorari at page 95a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 2000 (Cert. Pet. 2a). The petition for writ of certiorari was filed on May 24, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Due Process Clause

The due process clause at section one of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty or property without due process of law . . . "

Habeas Statute

The federal habeas corpus statute at 28 U.S.C. §2254(a) provides as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf

of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE FACTS

Respondent Edward R. Coss, Jr., is currently serving a sentence of six to twelve years imprisonment following his 1990 Pennsylvania conviction for aggravated assault (JA 62a). At sentencing for this offense, the state court judge took into consideration a prior Pennsylvania conviction for simple assault (Cert. Pet. 10a-11a). Upon consideration of testimony presented at a federal habeas corpus evidentiary hearing, both the district court and the court of appeals found that Mr. Coss had met his burden of proving that the prior conviction for simple assault was obtained in violation of the Sixth Amendment right to effective assistance of counsel (Cert. Pet. 16a-22a). In addition, the court of appeals granted conditional habeas relief, finding that a reasonable probability existed that Mr. Coss would have been found not guilty if counsel at the simple assault trial had subpoenaed available exculpatory witnesses (Cert. Pet. 18a-19a). Because the prior unconstitutional conviction affects the sentence currently being served, Mr. Coss asserts that he is "in custody in violation of the Constitution of the United States" under 28 U.S.C. §2254(a). He therefore requests that the judgment of the court below, conditionally granting habeas relief, be affirmed.

1. The 1986 Simple Assault Conviction

On June 25, 1986, local police in Dickson City, Pennsylvania, acting in response to telephoned complaints, arrived at the scene of a rowdy high school graduation party. At the scene, the police were faced with a group of intoxicated persons, one of whom punched a police officer in the head. Edward Coss, then 17 years of age, was arrested and charged with the assault. Once at the police station, he damaged the fixtures in his jail cell, leading to additional charges of institutional vandalism and criminal mischief (JA 40a-45a; Cert. Pet. 3a-4a).

On October 31, 1986, following a jury trial, Mr. Coss was convicted of simple assault, institutional vandalism and criminal mischief (JA 47a). On January 30, 1987, he received a sentence of six months to one year imprisonment for the institutional vandalism and criminal mischief, and a consecutive sentence of six months to one year imprisonment for the simple assault (JA 47a-48a).

On June 12, 1987, Mr. Coss filed a petition for relief under the Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. §9541, et seq. (amended 1988) (JA 50a; JA 39a, entries for 10/24/00 and 11/6/00). In his state post-conviction petition, Mr. Coss alleged that his attorney, an assistant public defender, had rendered constitutionally ineffective assistance at his simple assault trial. Specifically, Mr. Coss alleged that "[c]ounsel was ineffective for failure to essentially subpoena witnesses, which could have exonerated the petitioner, or favorably affected the petitioner's defense efforts at vindication." (JA 52a).

On June 23, 1987, the Lackawanna County Court of Common Pleas appointed new counsel to represent Mr.

Coss, and issued a rule to show cause why a hearing should not be granted (JA 57a). On June 29, 1987, the district attorney filed an answer to the petition (JA 59a). The county court took no further action on Mr. Coss's petition (JA 49a).

2. The 1990 Aggravated Assault Conviction

On August 30, 1989, approximately seven months after release from parole supervision for the 1986 convictions, Mr. Coss participated in a group assault upon an individual named Peter Petrovich (Cert. Pet. 6a). *See Commonwealth v. Coss*, 695 A.2d 831 (Pa. Super. 1997) (JA 61a). On September 11, 1990, following a jury trial, Mr. Coss was convicted of aggravated assault (JA 62a). On April 28, 1993, he was sentenced to six to twelve years imprisonment (JA 62a). The record reflects that the court considered the 1986 simple assault when imposing this sentence (Cert. Pet. 11a). On direct appeal, the Pennsylvania Superior Court vacated the sentence due to a possible inaccuracy in the presentence report (JA 62a). On remand, the Court of Common Pleas re-imposed the sentence of six to twelve years imprisonment, and again considered the simple assault conviction listed in the presentence report (Cert. Pet. 10a-11a) (JA 62a).

Mr. Coss did not challenge the constitutionality of the simple assault conviction when he was sentenced for the subsequent offense. As correctly noted by petitioner's amicus, Mr. Coss was sentenced under the Pennsylvania Sentencing Guidelines at 204 Pa. Code §303.1, *et seq.*, and those guidelines do not provide a mechanism for challenging the constitutionality of prior convictions (Brief of

Petitioner's Amicus, pp. 1, 13). *See* Pennsylvania Sentencing Guidelines, reprinted in Purdon's Pennsylvania Consolidated Statutes Annotated, after 42 Pa.C.S.A. §9721.

3. The Federal Habeas Corpus Petition

On September 15, 1994, Mr. Coss filed a *pro se* petition for habeas relief under 28 U.S.C. §2254 (JA 1a, Item 1). In the petition, Mr. Coss challenged his 1986 conviction for simple assault, alleging that he had received ineffective assistance from trial counsel. Additionally, in a *pro se* brief filed the same day, Mr. Coss alleged that the conviction for simple assault had been considered by the county court when imposing sentence for the 1989 aggravated assault (JA 1a, Item 3, pp. 6-7). A second amended petition, filed by the Federal Public Defender, repeated the prisoner's challenge to the 1986 simple assault conviction (JA 72a).

In retrospect, counsel for the prisoner was in error in styling the amended petition as an attack on the prior conviction, rather than an attack on the subsequent conviction for which the prisoner was in custody. The record reveals that the Commonwealth was not prejudiced by this error. The Commonwealth, in its filing of February 12, 1996, noted that the true basis of the claim was that the conviction for simple assault was alleged to have impacted the later sentence for aggravated assault (JA 14a, Item 55, par. 3). The district court applied similar reasoning at note two of its order of January 20, 1998, construing the petition as an attack on the sentence for which the prisoner was currently "in custody" (JA 22a, Item 87). *See also* District Court Memorandum of June 8, 1998 (Cert. Pet. 57a-58a).

On June 8, 1998, following an evidentiary hearing, the United States District Court for the Middle District of Pennsylvania denied the petition for writ of habeas corpus (Cert. Pet. 95a). The district court found that counsel at the 1986 simple assault trial had indeed failed to subpoena a number of exculpatory witnesses, and thus had failed to render effective assistance of counsel. The district court went on to hold that Mr. Coss was not prejudiced by the ineffectiveness. The district court granted a certificate of appealability on the ineffectiveness claim, and the prisoner filed a timely notice of appeal (JA 26a, Items 103 and 104).

The court of appeals reversed the judgment of the district court and ordered that the case be remanded with instructions to grant conditional habeas relief. *Coss v. Lackawanna County District Attorney*, 204 F.3d 453 (3rd Cir. 2000) (*en banc*) (Cert. Pet. 1a). The Third Circuit agreed with the district court that counsel had rendered ineffective assistance at the 1987 simple assault trial, but disagreed with the district court's assessment that no prejudice had resulted from the ineffectiveness. On the question of prejudice, the court of appeals concluded that "a reasonable probability exists that had counsel subpoenaed the witnesses, [Mr. Coss] would not have been found guilty of assaulting the officer (Cert. Pet. 18a-19a). On the question of relief, the court of appeals permitted the Commonwealth to choose between re-trying Mr. Coss for the 1986 simple assault or proceeding directly to resentencing on the 1989 aggravated assault, without consideration of the tainted prior conviction (Cert. Pet. 28a-29a).

4. Resolving a Circuit Split

On October 10, 2000, this Court granted the District Attorney's petition for writ of certiorari. In addition, this Court has granted certiorari in *Earthy Daniels v. United States*, No. 99-9136, a case which raises a similar issue. The decision in this case and in *Earthy Daniels* will help to resolve a circuit split regarding the effect of this Court's decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994).

In *Custis*, this Court held that with the exception of absence of counsel claims, the constitutionality of prior convictions may not be challenged at federal sentencing hearings. Four circuits have held that the rule of *Custis* is applicable in federal post-conviction proceedings, and that non-*Gideon* collateral challenges are no longer permissible. *See Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999), cert. denied, 120 S.Ct. 1255 (2000); *Ryan v. United States*, 214 F.3d 877 (7th Cir. 2000), petition for certiorari filed (Oct. 10, 2000) (No. 00-6554); *Partee v. Hopkins*, 30 F.3d 1011, 1012 (8th Cir. 1994), rehearing denied, 35 F.3d 365 (8th Cir. 1994) (Beam, joined by Wollman and Morris, dissenting from denial of rehearing *en banc*), cert. denied, 513 U.S. 1166 (1995); *Clawson v. United States*, 52 F.3d 806, 809 (9th Cir.), cert. denied, 516 U.S. 897 (1995). Two circuits have held that the rule of *Custis* is limited to federal sentencing hearings, and that prisoners may still raise non-*Gideon* collateral challenges in federal post-conviction proceedings. *Young v. Vaughn*, 83 F.3d 72, 77-78 (3rd Cir.), cert. denied, *Abraham v. Young*, 519 U.S. 944 (1996); *United States v. Clark*, 203 F.3d 358 (5th Cir. 2000), petition for certiorari filed (July 21, 2000) (No. 00-122).

The instant case presents the collateral challenge issue from the perspective of a state prisoner seeking habeas relief under 28 U.S.C. §2254. The *Earthy Daniels* case presents the issue from the perspective of a federal prisoner seeking post-conviction relief under 28 U.S.C. §2255. In both cases, the prisoners assert that their current sentences are based, in part, upon prior convictions which are unconstitutional. Thus, in both cases, the prisoners assert that they are "in custody in violation of the Constitution of the United States."

SUMMARY OF ARGUMENT

May a state sentence be challenged in federal habeas corpus where the sentence rests upon a prior conviction which is proved to be unconstitutional? The United States Court of Appeals for the Third Circuit answered this question in the affirmative. The Third Circuit found that Mr. Coss was prejudiced by ineffective assistance of counsel at his 1986 trial for simple assault, that the sentence he currently serves was affected by the judge's consideration of the unconstitutional prior conviction, and that he had a right to conditional habeas relief. The judgment of the court of appeals is consistent with existing Supreme Court case law.

Under *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1972) and *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989) (per curiam), a prisoner has the right to federal post-conviction relief where he is able to show that the sentence he currently serves was affected by the sentencing court's consideration of a constitutionally unreliable

prior conviction. This Court's decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994) does not overrule *Tucker* or *Maleng;* instead, *Custis* simply holds that federal sentencing hearings are not the proper forum for litigating non-*Gideon* challenges to the constitutionality of prior convictions.

For state prisoners, the proper forum is a federal habeas corpus proceeding under 28 U.S.C. §2254. In the habeas forum, rules regarding exhaustion, procedural default and burden of proof help to assure that the interests of the states are protected. Because Mr. Coss has met the exhaustion, procedural default, and burden of proof hurdles, it is requested that the judgment of the Court of Appeals, granting conditional habeas relief, be affirmed.

ARGUMENT

A STATE PRISONER SHOULD BE DEEMED "IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES" WHEN HE CHALLENGES THE SENTENCE HE CURRENTLY SERVES ON THE GROUND THAT IT WAS AFFECTED BY A PRIOR CONVICTION THAT IS CONSTITUTIONALLY UNRELIABLE DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

This case concerns the due process interest in reliability at sentencing. Specifically, it concerns a state prisoner's attempt to secure federal habeas relief where the judge who sentenced him took into consideration a prior conviction which was constitutionally unreliable due to ineffective assistance of counsel. The Third Circuit held that Edward Coss, a state prisoner proceeding under

28 U.S.C. §2254, had met his burden of proving three facts: first, that his prior state conviction for simple assault was tainted by ineffective assistance of trial counsel; second, that he was prejudiced by the ineffectiveness of trial counsel; and third, that a Pennsylvania Common Pleas Court judge took this constitutionally unreliable conviction into account when imposing sentence for a subsequent offense. Reasoning that consideration of the unreliable prior conviction rendered the current sentence unconstitutional, the court of appeals granted habeas relief, permitting the Commonwealth of Pennsylvania to either retry Mr. Coss for the prior offense or to resentence him on the later offense without taking into consideration the tainted prior conviction (Cert. Pet. 28a-29a).

Petitioners, the District Attorney of Lackawanna County and the Attorney General of Pennsylvania, did not seek certiorari to challenge the circuit court's findings regarding the ineffectiveness of counsel, the prejudice resulting from that ineffectiveness, or the judge's consideration of the prior conviction at subsequent sentencing. Instead, the petitioners and their amicus advance two arguments. First, they argue that the prisoner does not meet the statutory "in custody" requirement because the sentence on the prior simple assault conviction has expired. This first contention is answered by *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989) (per curiam), which holds that a prisoner meets the "in custody" requirement when the record reflects that a current or yet-to-be served sentence was affected by a constitutionally infirm prior conviction. The second argument advanced by the petitioners and their amicus is that the current sentence is valid even if it does rest upon a prior

conviction that was obtained in violation of the Constitution. On this second point, petitioners argue that the current sentence is susceptible to habeas challenge only if the prior conviction was obtained in violation of the *Gideon* right to appointed counsel. Petitioners thus invite this Court to extend its decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994) so as to preclude habeas collateral challenges on non-*Gideon* grounds, regardless of the extent to which a prior conviction may be constitutionally unreliable.

The petitioner's approach mixes sentencing apples with habeas oranges. The *Custis* limitation on collateral challenges at sentencing should not be read to foreclose relief in the habeas forum, where rules regarding exhaustion, procedural default, and burden of proof assure that the interests of the states are respected. Because there must exist some forum to vindicate the federal interest in due process at sentencing, respondent asks this Court to hold that post-conviction relief remains available where a state prisoner is able to meet his burden of proving that the sentence he currently serves was affected by the judge's consideration of a prior conviction which is constitutionally unreliable.

1. This Court Has Recognized a Due Process Interest in Reliability at Sentencing

In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963), this Court held that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, requires the appointment of counsel for indigent defendants charged with felony offenses. In the years following

Gideon, a question arose regarding what collateral use, if any, could be made of felony convictions secured in violation of the right to appointed counsel. This Court approved the granting of post-conviction relief in three cases where collateral use was made of convictions deemed constitutionally unreliable because they were obtained in violation of *Gideon*.

First, in *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258 (1967), this Court granted habeas relief to a state prisoner where a *Gideon*-infirm prior conviction had been introduced by the state as substantive evidence in a prosecution under a Texas habitual offender statute. Second, in *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1972), this Court affirmed the granting of post-conviction relief under 28 U.S.C. §2255 where a prior conviction was found to have been secured in violation of *Gideon*, and the prisoner demonstrated that the prior conviction had been considered by the district court when imposing sentence for a federal bank robbery. Third, in *Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014 (1972) (opinion announcing judgment of the court), habeas relief was granted where a *Gideon*-infirm conviction had been used to impeach the defendant during trial cross-examination.

The decisions in *Burgett*, *Tucker*, and *Loper* rested upon due process concerns regarding the reliability of the prior convictions and the unfairness of re-imposing a prior constitutional injury. On the question of reliability, the Court was concerned that a conviction secured in violation of the *Gideon* right to counsel might not reliably reflect whether the defendant had actually committed the underlying offense, and that the sentencing court's consideration of such a conviction would cause the prisoner to be sentenced "on the basis of assumptions concerning

his criminal record which were materially untrue." *United States v. Tucker*, *supra*, 404 U.S. at 447, 92 S.Ct. at 591-92, *citing Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (1948). On the question of re-imposing a prior constitutional injury, the Court was concerned that the principle of *Gideon* would be eroded if uncounseled prior convictions were used to support guilt or enhance punishment. *United States v. Tucker*, *supra*, 404 U.S. at 449, 92 S.Ct. at 593. Put another way, the court was concerned that the collateral use of a *Gideon*-infirm conviction would cause the defendant to "suffer anew" from the previous deprivation of his constitutional rights. *Burgett v. Texas*, *supra*, 389 U.S. at 115, 88 S.Ct. at 262.

The post-conviction remedy recognized in *Burgett*, *Tucker* and *Loper* has not been limited to *Gideon* claims alone. This Court's decision in *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 (1989) (per curiam), reflects how a non-*Gideon* claim may also serve as the basis for a habeas challenge to a sentence currently being served or yet-to-be served. The respondent in *Maleng*, Mark Edwin Cook, had been convicted on federal bank robbery charges and had also been convicted in state court on two counts of assault and one count of aiding a prisoner's escape. In 1985, the year he filed his federal habeas petition, Mr. Cook had begun serving his federal bank robbery sentence, but had not yet begun serving his consecutive state court sentence. In a federal petition for writ of habeas corpus, Mr. Cook challenged the constitutionality of an old 1958 Washington State conviction for robbery, alleging that the conviction was unconstitutional because he had not been given a competency hearing despite reasonable doubts regarding his fitness to stand trial. He further

alleged that the 1958 conviction had been used to enhance his sentence on the yet-to-be-served state conviction for assault and aiding escape. The federal district court dismissed the habeas petition, reasoning that because Mr. Cook had completed service of the 1958 sentence, he could no longer be considered "in custody" as required by the habeas corpus statute. The Ninth Circuit reversed, finding that Cook was "in custody" on the 1958 conviction because that conviction had been used to enhance his yet-to-be-served state sentence for assault and assisting escape.

The Supreme Court in *Maleng* affirmed the judgment of the court of appeals, but did so on grounds different from those cited by the Ninth Circuit. The *Maleng* court determined that the district court judge had been correct in concluding that the prisoner was not "in custody" on the 1958 conviction, as service of that sentence had been completed years before. The *Maleng* court went on to find, however, that Mr. Cook was "in custody" on the yet-to-be-served state sentence, because that sentence was alleged to have been enhanced by the prior constitutionally invalid conviction. *Maleng v. Cook, supra*, 490 U.S. at 493-94, 109 S.Ct. at 1926-27.

This Court's decision in *Maleng v. Cook* was, in at least three respects, consistent with the rule advanced by the respondent in the instant case. First, the "in custody" requirement was met because a sentencing judge had considered an allegedly unconstitutional prior conviction, even though the sentence on that prior conviction had been fully served. Second, there is no indication in *Maleng* that there had been any state court decision holding that the 1958 conviction was constitutionally infirm;

instead, as in the cases of *Burgett* and *Loper*, the federal habeas proceeding would itself be the forum which assessed the constitutional infirmity of the prior conviction. Third, the underlying constitutional claim was a non-*Gideon* claim, suggesting a broad application of the *Tucker* reliability principle.

This Court has recognized one exception to the *Tucker* reliability principle, applicable to status offenses where the fact of the prior conviction, rather than the reliability of the prior conviction, is deemed to be the controlling principle. In *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915 (1980), the defendant had been convicted in federal court of being a felon in possession of a firearm. Over defendant's objections, the district court permitted the prosecutor to introduce evidence of a 1961 Florida felony conviction, even though the defendant alleged that the prior conviction had been secured in violation of *Gideon*. The federal firearms conviction was affirmed in the court of appeals, and that judgment was affirmed in the Supreme Court.

In *Lewis*, the Court reasoned that use of an uncounseled felony conviction as the basis for a civil firearms disability, enforceable by criminal sanction, was not inconsistent with *Burgett*, *Tucker* and *Loper*. The Court observed that in each of those cases, "the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction." *Id.*, 445 U.S. at 67, 100 S.Ct. at 922. The federal gun laws, by contrast, "focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." *Id.* Given this discussion, the

Lewis decision should not be read as an abandonment of the *Tucker* reliability principle, but should instead be read as an exception applicable to status offenses, where the fact of conviction is the legal disability which underlies the subsequent prosecution. Simply put, the *Lewis* decision did not purport to disturb the due process reliability principle underlying *Burgett*, *Tucker* and *Loper*.

In a similar vein, this Court's decision in *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732 (1994) should not be read as an abandonment of the *Tucker* reliability principle, or a limitation on it's applicability in habeas corpus. In *Custis*, the defendant was convicted of possession of a firearm by a convicted felon, and the government sought enhanced sentencing under the Armed Career Criminal Act at 18 U.S.C. §924(e). Mr. Custis sought to challenge the constitutionality of two of his prior convictions, alleging ineffective assistance of counsel and a constitutionally deficient guilty plea. The district court applied the ACCA enhancement, ruling that only *Gideon* challenges were cognizable at a federal sentencing hearing. The Fourth Circuit affirmed the judgment of the district court, and this Court affirmed the judgment of the Fourth Circuit.

Because *Custis* concerned the conduct of a federal sentencing hearing, the Court was not presented with the issue of whether or to what extent prisoners could use federal post-conviction proceedings to challenge a current sentence on the ground that it was affected by a prior conviction alleged to be infirm on non-*Gideon* grounds. The *Custis* dissent asserted that the majority opinion "does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke

federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction." *Custis v. United States, supra*, 511 U.S. at 512, 114 S.Ct. at 1746 (dissent) (cite omitted). On this point, Justice Ginsburg, a member of the *Custis* majority, would appear to agree with the *Custis* dissenters. As reflected in a dissenting opinion in *Nichols v. United States*, 511 U.S. 738, 765, 114 S.Ct. 1921, 1937 (1994), Justice Ginsburg has suggested that *Custis* presented a "forum question" regarding "where, not whether, the defendant could attack a prior conviction for constitutional infirmity." It is submitted that Justice Ginsburg's analysis is correct.

2. This Case Illustrates Why The Tucker Rule Should Apply Generally to Constitutional Infirmities Which Undermine the Reliability of Prior Convictions Used to Enhance a Subsequent Sentence

As previously noted, this Court's decision in *Tucker* rests upon two principles of due process. The first principle is the need for reliability in criminal proceedings, and the resulting need for a mechanism to challenge the reliability of prior convictions which are used to enhance punishment. This first principle arises from the concern that a constitutionally infirm prior conviction might not reliably reflect that the prisoner actually committed the charged offense, and that a subsequent sentence should not rest upon evidence which is constitutionally unreliable. *United States v. Tucker, supra*, 404 U.S. at 447, 92 S.Ct. at 591-92. The second due process principle, the need to avoid re-imposition of constitutional injury, arises from the concern that the use of a constitutionally infirm prior conviction at a later sentencing causes the prisoner to

"suffer anew" the previous deprivation of his constitutional rights. *Id.* 404 U.S. at 499, 92 S.Ct. at 593; *Burgett v. Texas, supra,* 389 U.S. at 115, 88 S.Ct. at 262. In *Tucker,* this Court applied these principles in a federal post-conviction proceeding where the prisoner alleged that his current sentence was affected by the judge's consideration of a prior conviction obtained in violation of the *Gideon* guarantee of appointed counsel. The prosecution now seeks to limit the application of these principles to *Gideon* claims alone. The instant case demonstrates why these principles should not be so limited.

When the Pennsylvania Common Pleas Court judge sentenced Edward Coss for the 1989 assault on Peter Petrovich, that judge had every reason to believe that Mr. Coss had committed a similar assault back in 1986. As found by the court of appeals, the prior conviction was listed in the presentence report and was considered by the judge at the time sentence was imposed (Cert. Pet. 10a-11a). While it is impossible to know the extent to which the prior conviction affected the subsequent sentence, it is reasonable to infer that the effect was not favorable to the defendant.

We now know that the prior conviction for simple assault is constitutionally unreliable due to ineffective assistance of trial counsel. The public defender assigned to the case failed to subpoena several witnesses who would have testified that Edward Coss was not the person who committed the 1986 assault on the police officer. The court of appeals concluded that Mr. Coss met his burden of proving that he was prejudiced by counsel's failure to subpoena the witnesses; they further found a reasonable probability that "had counsel subpoenaed the

witnesses, [Coss] would not have been found guilty of assaulting the officer." (Cert. Pet. 18a-19a). The record therefore reflects that respondent's current sentence was affected by the judge's consideration of a prior conviction which is constitutionally unreliable. There is no principled reason to grant habeas relief where the unreliability is due to the absence of counsel, but deny habeas relief where the unreliability is due to the ineffectiveness of counsel.

Turning to the second due process principle, this case demonstrates how consideration of a constitutionally infirm prior conviction constitutes a re-imposition of the previous constitutional injury. At the time Edward Coss was sentenced for the 1989 assault on Peter Petrovich, he knew that the prior conviction for simple assault had been listed in his presentence report, and that the prior conviction would likely be taken into consideration by the judge when imposing sentence for the subsequent offense. Mr. Coss also knew that his attorney in the prior case had failed to subpoena several witnesses who could have offered exculpatory evidence. The use of the prior conviction for simple assault thus represented to the defendant a re-imposition of a previous constitutional injury. There is no principled reason to grant habeas relief where the re-imposed injury involves the absence of counsel, but deny habeas relief where the re-imposed injury involves ineffective assistance of counsel.

3. The Petitioner's Proposals to Narrow the Scope of Post-Conviction Collateral Challenges are at Odds with Controlling Constitutional Principles

The petitioners and their amicus in this case, together with the respondent and it's amicus in the case of *Earthy Daniels v. United States*, No. 99-9136, maintain that non-*Gideon, Tucker*-type claims should not be permitted in federal post-conviction proceedings. Among the arguments advanced in support of this position are the following: First, they suggest that collateral challenges should be limited to those few constitutional claims which would have come within the definition of "jurisdictional defects" under pre-1942 habeas corpus law. Solicitor General's Brief in *Earthy Daniels*, Arg. A, Sec. 1; Amicus Brief of Attorneys General, p. 18. Second, they suggest that non-*Gideon* post-conviction collateral challenges should not be permitted because the fact of prior convictions, rather than the reliability of prior convictions, is the controlling principle at sentencing. Amicus Brief of Criminal Justice Legal Foundation in *Earthy Daniels*, Amicus Brief of Attorneys General, p. 13 n.5 (noting that United States Sentencing Guidelines rely upon the "fact" of prior convictions). Third, they argue that even if reliability is a proper subject of constitutional inquiry, most prior convictions can be deemed reliable even if they are constitutionally infirm. Amicus Brief of Criminal Justice Legal Foundation in *Earthy Daniels*, pp. 11-14. Fourth, they argue that a rule permitting non-*Gideon* collateral challenges would be inconsistent with principles of state-federal comity. Brief of Petitioners, p. 21; Amicus Brief of Attorneys General, pgs. 8, 16. Respondent submits that these arguments are at odds with controlling

constitutional principles regarding habeas jurisdiction and the due process interest in reliability at sentencing.

a. The Jurisdictional Defects Theory

In *Custis*, this Court held that, with one exception, collateral attacks on prior sentences were prohibited at federal sentencing hearings. The one exception was the right to challenge a prior conviction on the ground that the defendant had been denied the right of appointed counsel as guaranteed by *Gideon*. In recognizing this exception for *Gideon* claims, the *Custis* decision noted that the failure to appoint counsel for an indigent defendant was a "unique constitutional defect" which had long been cognizable in habeas corpus, even under the restrictive "jurisdictional defect" theory of habeas jurisprudence in effect prior to the year 1942. *Custis v. United States, supra*, 511 U.S. at 496, 114 S.Ct. at 1738. Seizing upon this reference, the Solicitor General in *Earthy Daniels* and the Attorneys General in this case suggest that habeas corpus collateral attacks should now be limited only to those few claims which would have been entertained under the old "jurisdictional defect" theory of habeas corpus. Solicitor General's Brief in *Earthy Daniels*, Arg. A. Sec. 1; Amicus Brief of Attorneys General, p. 18. On this fundamental question of post-conviction judicial authority, this Court should reject the attempt to reanimate the "jurisdictional defects" theory.

The *Custis* decision creates a bright-line rule which promotes judicial efficiency by limiting the collateral challenges which may be raised in a federal recidivist sentencing proceeding. Nowhere, however, did the *Custis*

court indicate an intent to resuscitate the long-abandoned rule that only jurisdictional defects may be recognized in habeas corpus. A doctrinal shift of this magnitude would require the Supreme Court to overrule a line of case law from *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964 (1942), which discarded the jurisdictional defect limitation, to *Wainwright v. Sykes*, 433 U.S. 72, 79, 97 S.Ct. 2497, 2502 (1977), which noted the continued validity of *Waley*. Simply put, the fact that the *Custis* court chose to discuss the unique history of the right to appointed counsel is no justification for such an extreme change in habeas practice.

b. Reliability versus Fact of Conviction

Respondent's amicus suggests that Coss's focus on the reliability of prior convictions is misplaced, and that the Court should instead focus on the fact of prior convictions. Amicus Brief of Attorneys General, p. 13, n.5 (noting that United States Sentencing Guidelines rely upon the "fact" of prior convictions). This reliability versus fact of conviction argument requires this Court to decide which of two lines of case law is controlling in the instant case. If the due process principles of *Burgett, Tucker* and *Loper* are applied, then the reliability of prior convictions is a proper constitutional concern. If the relevant precedent is *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915 (1980), then the fact of conviction is dispositive. A careful reading of *Lewis* reflects that it is the reliability principle, and not the fact of conviction approach, which applies when considering a habeas challenge to the constitutionality of a sentence.

As previously discussed, the defendant in *Lewis* had been convicted in federal court of being a felon in possession of a firearm. Over defendant's trial objection, the district court permitted the prosecutor to introduce evidence of a prior felony conviction, even though the defendant alleged that the conviction had been secured in violation of the *Gideon* right to counsel. The felon in possession conviction was affirmed in the court of appeals, and that judgment was affirmed in the Supreme Court.

The *Lewis* court reasoned that the use of an uncounseled felony conviction as the basis for a civil firearms disability, enforceable by criminal sanction, was not inconsistent with *Burgett, Tucker* and *Loper*. The Court observed that in each of those cases, "the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past, uncounseled conviction." *Lewis v. United States, supra*, 445 U.S. at 67, 100 S.Ct. at 922. The federal gun laws, by contrast, "focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." *Id*. Thus, the *Lewis* decision recognizes that the fact of conviction is the controlling principle for status offenses, where the existence of the prior conviction is the legal disability which underlies the subsequent prosecution. Otherwise, *Lewis* reaffirms the validity of the due process reliability principle which is at the heart of *Tucker*. The due process interest in reliability at sentencing survived *Lewis*, and the existence of this principle supports the continued validity of non-*Gideon, Tucker*-type habeas claims.

c. The Purported Reliability of Constitutionally Infirm Convictions

Should this Court find that due process reliability concerns do, in fact, justify a mechanism for post-conviction collateral attacks, respondent's amicus in *Earthy Daniels* advances an alternative argument. The argument is that unconstitutional convictions are not necessarily unreliable. The Court is therefore invited to recognize a class of prior convictions which, though constitutionally infirm, are reliable enough to support an enhanced sentence for a subsequent offense. Amicus Brief of Criminal Justice Legal Foundation in *Earthy Daniels*, pp. 11-14.

On this point, the argument of respondent's amicus in *Earthy Daniels* has some support in the scholarly literature. One commentator observes that "*Tucker* relief makes sense only if a constitutional violation in obtaining the prior conviction affects the reliability of the conviction." Paul D. Leake, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense*, 19 Columbia Human Rights Law Review 123, 149 (Fall 1987). Another commentator, collecting the case law on this point, suggests that claims which implicate the *Tucker* reliability principle include absence of counsel, ineffectiveness of counsel, involuntary guilty pleas, and improper judicial comment on the right to silence; claims not implicating the *Tucker* reliability principle include Fourth Amendment violations, convictions under statutes later determined to violate equal protection, and convictions under statutes later determined to violate due process. D. Brian King, *Sentence Enhancement Based on*

Unconstitutional Prior Convictions, 64 New York University Law Review 1373, 1389-1397 (December 1989).

In the instant case, it is unnecessary to determine which infirmities render a conviction unreliable or whether such classifications should even be recognized. Under any standard, Edward Coss's prior conviction for simple assault has been proven unreliable. He received ineffective assistance of trial counsel, and the court of appeals found that "a reasonable probability exists that had counsel subpoenaed the witnesses, [Coss] would not have been found guilty of assaulting the officer." (Cert. Pet., pp. 18a-19a). Whatever the standard, the prior conviction for simple assault is both unconstitutional and unreliable.

4. Non-Gideon, Tucker-Type Habeas Claims are Compatible with the Interest in State-Federal Comity

The fourth argument advanced by petitioners and their amicus is that continued recognition of non-*Gideon*, *Tucker*-type habeas claims would be inimical to the interest in state-federal comity. In this regard the petitioners and their amicus argue that both the states and society at large have an interest in the finality of criminal convictions. They further argue that the state's interest is impinged when federal courts pass upon the alleged constitutional infirmity of criminal convictions long thought to be final. Brief for Petitioners, p. 21; Amicus Brief of Attorneys General, pp. 15-17.

Petitioners' comity argument commands serious attention. Concerns for state-federal comity are at the

heart of much of this Court's habeas corpus jurisprudence. While this Court has recognized the value of habeas corpus as the bulwark against convictions that violate fundamental fairness, this Court has also recognized that the habeas remedy comes at a cost to the state's interest in the finality of criminal litigation. *Coleman v. Thompson*, 501 U.S. 722, 747-48, 111 S.Ct. 2546, 2563-64 (1991). For this reason, this Court has consistently expressed a sensitivity to the interests of the states when fashioning the doctrines and procedures which control the disposition of federal post-conviction claims.

While this case clearly raises issues of state-federal comity, it must be noted that this case does not implicate one of the core concerns of the comity doctrine, to-wit, that "writs of habeas corpus frequently cost society the right to punish admitted offenders." *Engle v. Isaac*, 456 U.S. 107, 127, 102 S.Ct. 1558, 1572 (1982). Here, the respondent has fully served his sentence for the 1986 simple assault; the time cannot be returned to him, even though the conviction was found to be constitutionally unreliable due to the ineffective assistance of counsel. In a similar vein, respondent does not seek to deny the Commonwealth its right to exact punishment for the 1989 assault on Peter Petrovich; under the remedy fashioned by the circuit court, Mr. Coss will be resentenced for that offense (Cert. Pet. 28a, n. 14). All that the respondent seeks is to assure that a current sentence will be reconsidered where it is shown that it rests upon a prior conviction which is constitutionally unreliable.

Even though respondent's proposed rule would not deny states the right to impose punishment, this case does raise two legitimate state-federal comity concerns.

First, the state seeks to assure that its procedural rules are respected. Second, the state seeks to assure that judicial and prosecutorial resources are not misallocated (Amicus Brief of Attorneys General, pgs. 8, 16). These comity concerns are addressed by federal post-conviction rules regarding exhaustion, procedural default, and burden of proof. Taken together, these rules assure that state procedural processes are respected, and that state prosecutors are not asked to bear an unreasonable burden of proof in habeas cases raising non-*Gideon*, *Tucker*-type claims.

a. Exhaustion

Pursuant to 28 U.S.C. §2254(b)(1)(A), an applicant for a writ of habeas corpus must establish that he has "exhausted the remedies available in the courts of the State. . . . " In applying this exhaustion requirement, the focus is upon those state court remedies available at the time the federal petition is filed. *Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S.Ct. 2074, 2080 (1996). The exhaustion rule assures that state courts are given a fair opportunity, in advance of any federal litigation, to defend their judgments and address any constitutional claims.

In the instant case, the opinion of the court of appeals reflects that no state court remedies were available to Mr. Coss at the time he filed his federal petition. "As was made clear by the Pennsylvania Supreme Court in *Commonwealth v. Ahlborn*, 548 Pa. 544, 699 A.2d 718 (1997), collateral relief is not available under either the Post Conviction Hearing Act or under the common law remedies of state habeas corpus or coram nobis for a

petitioner who is not currently serving a sentence of imprisonment for the conviction he wishes to challenge, even if petitioner contends that collateral consequences stem from that conviction." (Circuit Court Opinion, Cert. Pet. 14a). Given the absence of available state court remedies, the district court and court of appeals acted properly in excusing the exhaustion requirement. *Id.* By requiring federal courts to consider the availability of state court remedies, the exhaustion rule helps to accommodate the comity concerns raised by petitioners.

b. Procedural Default

Rules regarding procedural default provide a second mechanism for protecting the comity interests which are asserted by the petitioners and their amicus. Under this judicially-created doctrine, a habeas petitioner must demonstrate that he utilized available state court procedures in the trial court and on direct appeal; in the alternative, the habeas petitioner must show cause and prejudice for his procedural default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558 (1982).

Questions regarding the rules of procedural default are not necessarily included within the issue presented in this case. It is nonetheless worth noting that there is an unanswered question regarding the procedural default rule as it applies to *Tucker*-type collateral challenges, to-wit, whether the prisoner's responsibilities are fulfilled when he challenges the constitutionality of the enhanced sentence in the subsequent prosecution, or whether the prisoner is also charged with the responsibility of raising his constitutional claim in the prior criminal case. The

reported case law does not discuss this issue, and the answer will control the result in most habeas cases which raise *Tucker*-type collateral challenges. It is submitted that application of the procedural default rule should be guided by the text of the habeas corpus statute, which focuses on the sentence for which the prisoner is "in custody." *See* 28 U.S.C. §2254(a). The prisoner's responsibilities should therefore be deemed fulfilled when he challenges the constitutionality of the enhanced sentence in the subsequent prosecution.

However the procedural default question is eventually resolved, the record in this case reflects that Mr. Coss would meet either formula. As noted by petitioners' amicus, the Pennsylvania Sentencing Guidelines do not provide a mechanism for challenging the constitutionality of prior convictions at subsequent sentencing hearings. Amicus Brief of Attorneys General, pgs. 7, 13. For this reason, Mr. Coss cannot be faulted for failing to raise his collateral challenge at sentencing for the Peter Petrovich assault. If the rules of procedural default are held to apply to the prior conviction, Mr. Coss would be found to have complied with that approach. While in custody for the 1986 simple assault, he filed a timely state post-conviction petition alleging that he had received ineffective assistance of counsel at trial (JA 50a-51a). It goes without saying that Mr. Coss cannot be faulted for the fact that the Court of Common Pleas of Lackawanna County failed to act on his petition, and that it was still pending seven years later when the federal petition was filed (JA 49a).

In summary, the rules of procedural default help to assure that proper deference is paid to state mechanisms

for relief in the sentencing court and on direct appeal. The existence of these rules helps to assure that the interest in state-federal comity is respected when litigating non-*Gideon, Tucker*-type claims.

c. Burden of Proof

The rules regarding the burden of proof in federal habeas corpus proceedings are another means of assuring that the interests of state-federal comity are respected. This Court has noted that "even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a burden of proof to the defendant." *Parke v. Raley*, 506 U.S. 20, 31, 113 S.Ct. 517, 524 (1992). Given this burden of proof, delay in the litigation of habeas corpus claims is apt to disadvantage the prisoner more than the state. *Garlotte v. Fordice*, 515 U.S. 39, 46, 115 S.Ct. 1948, 1952 (1995).

Because of the federal rule on the burden of proof in habeas corpus, it is the prisoner who must find the witnesses, the prisoner who must present the evidence, and the prisoner who must persuade the court that he has met his burden of proof. This allocation of the burden of proof is yet another way in which federal habeas corpus procedure assures that non-*Gideon, Tucker*-type claims will be addressed with due regard for the interests of the states.

To summarize, adjudication of non-*Gideon, Tucker*-type habeas claims is not inconsistent with the interest in state-federal comity. The exhaustion rule assures that states are given the initial opportunity to pass upon criminal judgments alleged to be constitutionally infirm. The

procedural default doctrine helps to assure that state procedural rules are respected, and that prisoners will be obliged to challenge the constitutionality of enhanced sentences at the earliest possible opportunity. In addition, the federal rule on burden of proof assures that the prisoner, not the state, will bear the risk that evidence or witnesses will have become unavailable. The existence of these rules permits federal courts to vindicate the due process right to reliability at sentencing, while at the same time assuring that essential state interests are protected.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

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Supreme Court, U.S.
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No. 99-1884

In the
Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

EDWARD R. COSS, JR.,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF OF THE STATES OF COLORADO, ALABAMA, ALASKA, ARKANSAS, DELAWARE, KANSAS, MASSACHUSETTS, MICHIGAN, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, UTAH, VERMONT, VIRGINIA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a federal habeas corpus petition that attacks a fully-expired conviction, but does not attack a later sentence that was enhanced based upon the expired conviction, satisfy the "in custody" requirement for federal habeas jurisdiction?

2. Did the court of appeals err in holding that, whenever a sentencing court considers a fully-expired prior conviction, a defendant is constitutionally entitled to challenge the validity of that conviction on federal habeas corpus review?

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INTEREST OF THE AMICI CURIAE

This case concerns the ability of federal habeas corpus petitioners to challenge fully-expired state convictions that are used to enhance sentences imposed for later state convictions. The state Attorneys General have a significant law enforcement interest in that issue. Collateral challenges to fully-expired prior convictions create significant practical problems, undermine the public's faith in the criminal process, and show disrespect for the states' own rules regarding when their convictions may properly be challenged.

STATEMENT OF THE CASE

A. The 1990 Case

Following a jury trial in the Court of Common Pleas of Lackawanna County, Pennsylvania, Respondent Edward Coss was convicted in September 1990 of aggravated assault and simple assault. Applying the Pennsylvania Sentencing Guidelines, 204 Pa. Code §303.1-303.14, the court sentenced Coss to six to twelve years' imprisonment. That sentence was within the range provided by the sentencing guidelines, after taking into account numerous prior convictions on Coss's record. On direct appeal, the Pennsylvania Superior Court, in December 1995, vacated the sentence due to concerns that the presentence report was not accurate. J.A. 62a.

At his 1996 resentencing hearing, Coss's counsel challenged the enhancement based on Coss's criminal record, arguing that his three misdemeanor convictions in 1986 all arose from the same transaction and, accordingly, his prior record "score" should be reduced from 3 to 2. The trial court agreed, but resentenced Coss to the same six-to-twelve-year sentence, which

remained within the standard sentencing guidelines range. J.A. 62a. In imposing sentence, the trial court stated:

> I've taken into consideration the statements by [Coss's attorney] and the seriousness and nature of the crime involved here, the well being and protection of the people who live in our community, your criminal disposition, your prior criminal record, the possibility of your rehabilitation, and the testimony that I've heard. . . .

J.A. 66a.

The Pennsylvania Superior Court affirmed the sentence in June 1997 (J.A. 61a); Coss did not pursue his direct appeal further. Also in June 1997, Coss filed a petition under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §9541 *et seq.*, in the trial court challenging his conviction and sentence. That petition is still pending. Coss did not allege, either at trial, on direct appeal, or in his PCRA application that the 1986 convictions should have been disregarded for purposes of determining his sentence for the 1990 offense.

In February 1997, while his direct appeal was still pending, Coss filed a habeas corpus petition in the United States District Court for the Middle District of Pennsylvania attacking the 1990 conviction. Less than two months later, the court dismissed the petition for failure to exhaust state court remedies.[1]

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[1] Neither Coss's 1997 federal habeas corpus petition nor his 1997 state PCRA petition is part of the record in this case. We have lodged with the Court a copy of those petitions, and a copy of the district court's docket entries with respect to the federal petition.

B. The 1986 Case

Coss's three 1986 misdemeanor convictions arose from Coss's punching a police officer and, following his arrest, destroying furnishings in his jail cell. He was convicted by a state jury of institutional vandalism, criminal mischief, and simple assault. In early 1987, the court sentenced Coss to six months to one year on the simple assault charge and six months to one year on the institutional vandalism and criminal mischief charges, to run consecutively. In February 1987, Coss filed a Petition for Reconsideration of Sentence, which was denied. A few months later, Coss filed a PCHA petition with the court, challenging the conviction and sentence on the basis of, *inter alia*, ineffective assistance of counsel. J.A. 46a-49a.[2] Coss was discharged from Pennsylvania parole supervision in early 1988. Pet. App. 6a. For reasons not in the record (but possibly because Coss had fully served his sentence), the court never acted on Coss's PCHA petition.[3]

In 1994, with his PCHA petition still technically pending in state court, Coss filed a *pro se*, form federal habeas corpus petition under 28 U.S.C. §2254. In

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[2] The predecessor to the PCRA was the Post-Conviction Hearing Act (PCHA), which had also been codified at 42 Pa. Cons. Stat. §9541 *et seq.*

[3] Under Pennsylvania law, post-conviction relief is not available to a petitioner who has been released from custody and is not on probation or parole. *Commonwealth v. Ahlborn*, 699 A.2d 718, 720-21 (Pa. 1997).

completing the form, Coss indicated that he was challenging the 1986 convictions. J.A. 1a (Dkt #1). The only reference Coss made to the 1990 conviction was in response to the inquiry whether "you have any future sentence to serve after you complete the sentence imposed by the judgment under attack." Coss added that he intended to file a separate attack on the 1990 judgment in the future. J.A. 1a (Dkt #1, at 7). In 1995 and 1996, with the assistance of counsel, Coss filed his Amended and Second Amended petitions. J.A. 11a (Dkt #44); J.A. 72a-75a. The amended petitions specifically challenged only the 1986 convictions, which they alleged were obtained in violation of Coss's Sixth Amendment right to effective assistance of trial counsel and his Fourteenth Amendment due process rights. *Id.* The amended petitions did not mention the 1990 conviction or sentence.

The United States District Court for the Middle District of Pennsylvania denied the Second Amended petition, finding that, although Coss's trial counsel's performance was objectively unreasonable, Coss failed to demonstrate prejudice. Pet. App. 95a-96a. The court explained that it had jurisdiction to entertain Coss's action because his 1986 conviction was used to enhance his sentence for the 1990 conviction. *Id.* at 105a-108a.

A panel of the court of appeals reversed, concluding that Coss had shown prejudice from his counsel's ineffective assistance during the 1986 trial. The court remanded to the district court with instructions that it order a writ of habeas corpus to issue conditioned upon Coss's being resentenced without consideration of the 1986 conviction. Pet. App. 51a, 81a. Two days later,

the court of appeals voted to rehear the case en banc, and vacated the panel opinion. *Id.* at 94a.

On rehearing en banc, the court reversed the district court on the same grounds as the panel had. With respect to its jurisdiction, the court interpreted *Maleng v. Cook*, 490 U.S. 488 (1989), as holding that a petitioner "satisf[ies] the 'in custody' requirement for federal habeas corpus jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction." Pet. App. 12a. Because Coss "contends that the sentence for his 1990 conviction was adversely affected by the 1986 simple assault conviction," the court concluded it had jurisdiction. *Id.* at 12a-13a. The court excused Coss's failure to exhaust his state court remedies because his PCHA petition had been pending for seven years. *Id.* at 13a. The court also recognized that Coss had not "presented the Pennsylvania state courts with his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990," but concluded that, because collateral relief for that sort of claim was not available under the PCHA or other state post-conviction remedies, further state proceedings would be futile. *Id.* at 13a-14a.

Turning to the remedy, the court of appeals stated that the "normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding." Pet. App. 22a. The court observed, though, that Coss could not be "freed" from his 1986 conviction because he has already served his time. Rejecting Coss's contention that the only available remedy was to

require the state to resentence him under the 1990 conviction, *id.* at 23a, the court extended to the state the option of retrying Coss for the 1986 offense. *Id.* at 28a. The court acknowledged that Coss would have to be resentenced under this 1990 conviction in any event, but felt that "comity requires us to afford the Commonwealth the opportunity to cure the original constitutional defect." The court expressed no opinion as to whether Pennsylvania law permits such a retrial. *Id.* at 28a-29a & n.14.

Two judges dissented on the ground that the 1986 conviction did not affect the 1990 sentence. *Id.* at 30a-35a. And two judges concurred in part and dissented in part, disagreeing only with the court's decision to afford the state the opportunity to retry Coss for the 1986 offense. *Id.* at 36a-49a. This Court granted certiorari on October 10, 2000.

SUMMARY OF ARGUMENT

1. Coss was not "in custody" under his 1986 conviction when he filed his habeas corpus petition. The court of appeals nevertheless found that Coss was "in custody" for purposes of this habeas action by construing his petition as an attack on the constitutionality of his 1990 sentence. But Coss's petition was unmistakably directed against the 1986 conviction, not the 1990 sentence, and there was no reason for the district court or court of appeals to treat it otherwise. This is particularly so because Coss had the assistance of counsel when he filed his two amended petitions.

The timing of the various proceedings confirms that Coss's petition attacked only his 1986 conviction.

Coss filed his initial habeas petition in 1994 and his amended petitions in 1995 and 1996, during which time his 1990 conviction and sentence were still on direct review in the state courts. Had Coss styled his habeas petition as an action against his 1990 sentence, it would properly have been dismissed for failure to exhaust state remedies. By misreading the procedural posture of the case and the true meaning of Coss's habeas petition, the court of appeals ran afoul of the simple command of *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989): a habeas petition does not satisfy the "in custody" requirement when it challenges only a fully-expired conviction, even when that conviction is used to enhance a later sentence.

2. Even if Coss's petition were directed at his 1990 sentence, he would not be entitled to habeas corpus relief because he cannot demonstrate a violation of federal law. *Custis v. United States*, 511 U.S. 485 (1994), teaches that a defendant is constitutionally entitled to challenge the validity of an earlier conviction used for sentence enhancement only when the defendant asserts a *Gideon* violation. Coss cannot assert a *Gideon* violation; he therefore lacks a free-standing constitutional right to challenge the 1990 sentence based on the alleged invalidity of his 1986 conviction. Nor can Coss show that state law gives rise to a due process right to challenge the validity of his 1986 conviction: the Pennsylvania Sentencing Guidelines appear not to authorize such collateral attacks; and in any event, Coss waived that claim by failing to raise it in state court.

3. Ignoring *Custis*, the court of appeals found that Coss had a constitutional right to challenge the validity of his 1986 conviction merely because it was

considered during sentencing in his 1990 case. If adopted here, this approach would increasingly involve the federal courts in reviewing old state convictions: any prisoner would be entitled to attack (on any ground) a fully-expired conviction simply by showing that his conviction was considered, during sentencing, by a court in any jurisdiction. This would drain limited resources and negate many rules and statutes that the states and the federal government have enacted to protect society's interest in the finality of criminal convictions.

ARGUMENT

Federal courts have jurisdiction to review the habeas corpus petition of a state prisoner only if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 18 U.S.C. §2241(c)(2). Thus, when a habeas petitioner seeks to challenge the validity of a fully-expired state conviction that was used to enhance a later sentence, he must show that he is "in custody" under the conviction he is attacking and that the sentence enhancement violated federal law. Because Coss can make neither showing, the judgment below should be reversed.

I. Because Coss's Habeas Corpus Petition Attacked His Fully-Served 1986 Conviction, Not His 1990 Sentence, He Failed To Meet The "In Custody" Prerequisite To Federal Court Jurisdiction

In *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989), this Court clarified the "in custody" rules that apply when a habeas petitioner contends that a fully-served conviction was invalid and may not be used to enhance the sentence arising from a later conviction. In that situation, held the Court, the habeas petitioner is not "in custody" under the prior conviction, but he is "in custody" under the later conviction. The Court therefore found that the Ninth Circuit Court of Appeals erred when it held that Cook was still "in custody" under his earlier 1958 conviction. The Court then read Cook's *pro se* habeas petition broadly to assert a challenge not only to his 1958 conviction, but also to his 1978 sentence, as enhanced by the 1958 conviction. The Court ruled that, when read as a challenge to his 1978 sentence, Cook's petition satisfied the "in custody" requirement. These holdings directly resolve this case.

Coss's Second Amended habeas corpus petition attacked only his 1986 conviction; it did not mention, let alone attack, his 1990 sentence. *See* J.A. 73a ("The convictions which Coss challenges in the instant Habeas Corpus Petition are for institutional vandalism . . ., criminal mischief, . . . and simple assault . . . . *Commonwealth v. Coss*, No. 86-645, Lackawanna County Court of Common Pleas."). Coss filed his habeas corpus petition as part of the typical process of reviewing the 1986 conviction. First, he asked the trial court to reconsider the sentence (Pet. App. 104a); then

he sought to overturn the conviction by filing a post-conviction application in state court; and when the state court did not act upon the application for seven years, he filed his federal habeas corpus petition. Pet. App. 13a. Because the sentence imposed for Coss's 1986 conviction had expired, Coss's habeas corpus petition failed to satisfy the "in custody" requirement as delineated in *Maleng*.

It was simply wrong for the court of appeals to hold that the district court "appropriately construed [Coss's] petition as challenging the 1990 conviction, rather than his expired conviction." Pet. App. 12a. The most obvious problem with that "construction" is that the Second Amended petition did not even mention the 1990 conviction. Moreover, the petition could not possibly have attacked the 1990 sentence, for the direct appeal of that sentence was *sub judice* in the Pennsylvania Superior Court when Coss filed his initial habeas petition. And the Pennsylvania Superior Court did not affirm the resentence until June 1997—several months *after* a magistrate had issued a report and recommendation with respect to Coss's petition. *See* J.A. 61a-71a; Pet. App. 104a.

Thus, had Coss's petition truly challenged the 1990 conviction itself, it would have been unexhausted and procedurally barred. Only at the conclusion of direct and post-conviction review of the 1990 conviction and sentence could Coss have filed a fully-exhausted federal habeas corpus petition challenging that sentence. (Indeed, when, in 1997, Coss actually filed a federal habeas petition that attacked his 1990 conviction, the district court dismissed it as

unexhausted.)[4] And only if Coss had raised the validity of the 1986 conviction during his state court challenge to the 1990 conviction could he have properly pursued that claim on federal habeas review. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1990). But Coss did not attack the validity of the 1986 conviction at his 1990 sentencing or in his subsequent appeals.

Coss is not assisted by this Court's decision in *Maleng v. Cook* to construe Cook's *pro se* habeas petition as asserting a challenge to his 1978 sentence. First, Cook's habeas petition specifically asserted as its second ground for relief that his later sentence "has been unlawfully enhanced on the information of an invalid 1958 conviction." Joint Appendix, *Maleng v. Cook*, at 6A (filed Dec. 21, 1988). Coss's petition, in contrast, did not complain about the 1990 conviction and sentence. Second, Cook filed his petition *pro se* (*id.* at 8), whereas Coss filed his amended petitions through counsel. Third, when Cook filed his habeas petition, his later conviction and sentence (unlike Coss's) were not still on direct appeal. In sum, whereas all the surrounding circumstances of Cook's case suggested that his *pro se* petition was actually attacking the later sentence as well as the prior conviction, the language in Coss's habeas petition and

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[4] The Third Circuit found Coss's claim to be exhausted based on the futility exception, finding that Coss had no further state court forum in which to challenge the validity of his 1986 conviction. Pet. App. 13a-14a. A habeas corpus application is not exhausted, however, if the state court judgment remains pending on direct appeal. *See, e.g., Sherwood v. Tomkins*, 716 F.2d 632, 634 (CA9 1983). The Third Circuit also expressed concern that Coss's PCHA application had been sitting in state court for seven years (Pet. App. 13a), but it ignored that Coss had been released from custody less than two years after he filed the application.

the timing of the proceedings confirm that Coss was not—and could not possibly have been—challenging his 1990 sentence. A court does not have the discretion to construe a habeas corpus petition as an attack on a later conviction and sentence in these circumstances.

II. Even If Coss's Petition Were Directed At His 1990 Sentence, He Would Not Be Entitled To Habeas Corpus Relief Because, Under *Custis v. United States*, He Cannot Establish A Violation Of Federal Law

Coss does not have a free-standing right under the Constitution to challenge the use of his 1986 convictions in setting his 1990 sentence. In *Custis v. United States*, 511 U.S. 485, 493-97 (1994), this Court held that the Constitution provides a defendant the right to collaterally challenge a prior conviction before it is used to enhance a sentence only when the prior conviction was obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). And, as the United States explains in its brief in *Daniels v. United States*, No. 99-9136 (cert. granted Sept. 8, 2000), it necessarily follows that the Constitution provides the right to collaterally challenge the prior conviction on federal habeas corpus review only when a *Gideon* violation is alleged.

Coss has not alleged a *Gideon* violation. He therefore cannot demonstrate a violation of federal law, as is necessary to invoke habeas corpus jurisdiction, unless he can show that (1) the Pennsylvania Sentencing Guidelines authorize challenges to prior convictions on grounds other than *Gideon*, (2) he asserted such a challenge as a basis for attacking his

1990 sentence, (3) the trial court failed to consider the challenge or made a legal error in analyzing the validity of the prior conviction, and (4) such error by the court constituted a violation of federal, as opposed to state, law.

Coss cannot make the necessary showing. First, the Pennsylvania Sentencing Guidelines do not expressly authorize challenges to prior convictions: they neither provide a mechanism for such a challenge nor specify the grounds that would disqualify a prior conviction from being considered in sentencing. This strongly suggests that, when called on to decide the issue, the Pennsylvania Supreme Court will hold that the guidelines do not authorize challenges to prior convictions (absent *Gideon* claims).[5]

Second, Coss did not ask the 1990 trial court to disqualify his 1986 convictions from consideration in sentencing. Nor did he argue in the appeals of his 1990 conviction that his sentence was unconstitutionally enhanced by invalid 1986 convictions. Coss

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[5] The Pennsylvania Supreme Court's inquiry might be informed by the operation of the federal Sentencing Guidelines, which do not authorize collateral challenges to prior convictions. *See* Sentencing Guidelines §4A1.2, Application Note 6 (Nov. 1, 1993) ("this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction of sentence beyond such rights otherwise recognized in law (*e.g.*, 21 U.S.C. §851 expressly provides that a defendant may collaterally attack certain prior convictions)"); *see also Ryan v. United States*, 214 F.3d 877, 879-80 (CA7 2000) (the federal Sentencing Guidelines "use the *fact* of prior convictions as conclusive when calculating criminal history").

therefore cannot complain that the state courts overlooked or mishandled any such claim.[6]

Accordingly, even if we assume that Coss's habeas petition was directed against his 1990 sentence (as enhanced by the 1986 conviction), Coss would lose. Under *Custis*, Coss did not allege a "violation of the Constitution or laws or treaties of the United States," as required for federal court jurisdiction.

III. The Third Circuit Erred In Holding That, Whenever A Sentencing Court Considers An Expired Prior Conviction, A Defendant Is Entitled To Challenge The Validity Of That Conviction

Instead of engaging in the above analysis, the court of appeals merely inquired into "whether the sentencing court at the 1990 conviction took into consideration the 1986 conviction." Pet. App. 10a. After concluding that the sentencing court had taken the 1986 conviction into account, the court of appeals ruled that, under *Maleng*, the district court had jurisdiction under §2254 to review the validity of that conviction. *Id.* at 10a-13a. That reasoning not only

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[6] Even if Coss had challenged his 1986 conviction at his 1990 sentencing proceeding, and Pennsylvania expressly granted him the right to do so, it is still far from clear that a state court's error with respect to that challenge would be an error of federal law subject to federal habeas corpus review. *Compare Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (federal habeas corpus relief is not available for errors of state law), *with Hicks v. Oklahoma*, 447 U.S. 343 (1980) (defendant's federal due process rights were violated when state law requiring jury to fix punishment was not followed). The Court need not reach that issue in this case.

ignores the teachings of *Custis*, it would create significant practical problems if adopted by this Court. Countless state sentencing proceedings—whether under statutes granting judges broad discretion, under sentencing guidelines, or under recidivist schemes—take prior convictions "into consideration." To allow state prisoners to use §2254 to mount full-scale challenges to the validity of prior convictions in all such cases would nullify state and federal limitations on challenges to final judgments and impair the states' ability to protect the integrity of their criminal judgments.

Although the states employ a wide variety of post-conviction processes, all states have a common and compelling interest in protecting the finality of their criminal convictions. To this end, state post-conviction procedures employ statutes of limitations, custody requirements, doctrines such as forfeiture and laches, and presumptions of regularity. States may require post-conviction challenges to be made in the court where the conviction was obtained, and may provide for streamlined procedures for such challenges, including limitations on the right to a hearing.

The federal approach is similar. Even before enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), federal habeas review was limited by the doctrines of abuse of the writ, procedural default, exhaustion, and non-retroactivity. The AEDPA stiffened many of those rules and added new limits, such as the one-year limitations period codified at 28 U.S.C. §2244(d). These procedural limitations serve to protect the states against, *inter alia*, having to defend stale convictions.

The court of appeals' approach would effectively abrogate many of these state and federal procedural limitations. If a defendant has the right to premise a full habeas attack on the mere fact that his conviction is later used in sentencing, then it hardly matters whether he earlier sought review of his conviction or whether he followed the proper procedures in doing so. For defendants who unsuccessfully pursued direct, post-conviction, and federal habeas review, the court of appeals' approach would offer an "enhancement exception" to the various rules that govern second and successive petitions. For those who failed to pursue state remedies, the court of appeals' approach would avoid the doctrines of exhaustion and procedural bar.

The practical problems would be considerable if states were required to defend in federal court every challenge to a prior criminal conviction that was possibly used to enhance a later sentence. Even assuming that the great majority of such challenges would be without merit, state prosecutors faced, for instance, with claims under *Boykin v. Alabama*, 395 U.S. 238 (1969), would be forced to reconstruct guilty plea colloquies, locate the attorneys who were present during the colloquies, and possibly locate the sentencing judge.

Similarly difficult would be defense of ineffective assistance claims, where records, attorneys, and the trial judge may no longer be available or (as occurred here) the defense attorney can no longer recall the facts and strategic considerations that informed her trial decisions. *See* Pet. App. 8a-9a & n.7. These difficulties would be greatly magnified when out-of-state convictions were among those considered at sentencing. Assuming out-of-state witnesses could be located and

summonsed under interstate compacts, the cost of transportation and housing alone might prove prohibitive.

The difficulties of permitting challenges to fully-expired convictions at later sentencing proceedings are illustrated by the remedy the court of appeals imposed in this case after holding that the 1986 conviction was invalid. The court remanded with instructions that the district court issue a writ of habeas corpus (which would allow Coss to be resentenced) conditioned on giving the state the option of retrying Coss for the 1986 conviction. Pet. App. 28a-29a. Although the court saw itself as giving the state the opportunity "to cure the Sixth Amendment defect," *id.* at 23a, its solution is rather problematic. It would be unusual for a state to retry a person for an offense where (1) he has already fully served his sentence, and (2) the conviction has not actually been vacated or overturned. Whether or not state and federal law actually permit such a retrial, the very fact that the court of appeals saw fit to propose such an odd remedy highlights the difficulties that will ensue if courts must routinely permit challenges to the validity of prior convictions.

As *Custis* makes clear, the Constitution requires an inquiry into the validity of prior convictions used at sentencing only when the alleged failing is the denial of counsel under *Gideon*. Where a petitioner challenges his current sentence, his claim is that fundamental elements of due process were lacking *at sentencing*. *See, e.g., Townsend v. Burke*, 334 U.S. 736, 741 (1948) (due process violated where the sentencing court relied on a materially false statement of the defendant's record of convictions). A claim that an uncounseled prior conviction, obtained in violation of

Gideon, was used at sentencing is properly viewed as a challenge to the sentencing process, and not as a "back door" challenge seeking to reopen the prior conviction itself. As this Court emphasized in *Custis*, a *Gideon* violation is a "unique constitutional defect," 511 U.S. at 496, that historically was considered to impair jurisdiction. *Id.* at 494. For this reason, a *Gideon* violation occupies a sufficiently unique place in constitutional law as to implicate due process principles that are inherent in a later sentencing proceeding. *See id.* at 496.

By contrast, other types of constitutional challenges to prior convictions, such as challenges to a guilty plea colloquy under *Boykin* or claims of ineffective assistance of counsel, do not "rise[ ] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Custis*, 511 U.S. at 496. As a general matter, enhanced punishment for the latest crime is properly viewed as "a stiffened penalty" for that offense, not as additional punishment for the commission of the prior crimes. *Gryger v. Burke*, 334 U.S. 728, 732 (1948).

Although a legislature is entitled to mandate that a sentencing court inquire into all alleged defects in a prior conviction, *see* 21 U.S.C. §851 (discussed in *Custis*, 511 U.S. at 491-92), it is not required to do so. This is consistent with our nation's longstanding tradition of giving sentencing judges latitude to consider a broad range of factors when determining the appropriate sentence, including prior criminal conduct that did not result in a conviction, *see Williams v. New York*, 337 U.S. 241, 244-47 (1949), and even conduct for which the defendant has been acquitted, *see United States v. Watts*, 519 U.S. 148, 152-56 (1997).

The Third Circuit wrongly ignored the fundamental distinction between *Gideon* claims and non-*Gideon* claims in this context and wrongly assumed that non-*Gideon* challenges to prior convictions can always be alleged in federal reviews of later sentencing proceedings.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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In The

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

EDWARD R. COSS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the custody requirement of the federal habeas corpus statute (28 U.S.C. §2241 *et seq.*) contemplates collateral attack, on constitutional grounds, upon fully-expired conviction used to enhance later conviction under present habeas review for which the prisoner is presently in custody.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Hohn v. United States*, 524 U.S. 236 (1998).[1]

SUMMARY OF ARGUMENT

1. *Maleng v. Cook* properly permits federal collateral attack on unconstitutional prior convictions used to enhance a prisoner's current incarceration. While federal courts may

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[1] All parties have consented to the appearance of NACDL as *amicus curiae* in this matter and letters of consent have been lodged with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

not entertain direct challenges to fully-expired convictions and sentences, *Maleng* nonetheless broadly construed the custody requirement such that expired convictions were still subject to collateral attack to the extent that they were being latterly used to enhance subsequent convictions and sentences the prisoner was presently serving. The lower federal courts are virtually unanimous in holding that a prisoner whose present sentence is enhanced by a prior unconstitutional conviction may still seek federal habeas corpus review to the extent that his present sentence was enhanced by the earlier unconstitutional conviction.

2. *Custis v. United States* does not preclude federal collateral attack on unconstitutional prior convictions used to enhance current incarceration, particularly where the earlier conviction is attacked for constitutional defects directly related to factual accuracy. *Custis* was a federal sentencing case which construed the recidivist provisions of the Armed Career Criminal Act. It had no occasion to consider the entirely separate realm of federal post-conviction review, which has entirely different institutional considerations from the efficient judicial administration of federal sentencing proceedings. More to the point are this Court's decisions in *Townsend v. Burke* and *United States v. Tucker*, holding that sentences imposed on the basis of misinformation of constitutional magnitude – such as constitutional defects that undermine the factual accuracy and reliability of earlier convictions – must be set aside on both Fifth and Sixth Amendment grounds.

3. AEDPA has no application to this case. Respondent's habeas petition was filed prior to the statute's effective date. In any event, nothing contained in the amended statute suggests that Congress intended to change the judicial interpretation of "custody" that this Court has carefully crafted over the last forty years.

ARGUMENT

THE COURT OF APPEALS CORRECTLY AWARDED FEDERAL HABEAS RELIEF TO A STATE PRISONER WHOSE SENTENCE WAS IMPROPERLY ENHANCED THROUGH THE USE OF AN UNCONSTITUTIONAL PRIOR CONVICTION

The court of appeals properly determined that Edward Coss' most recent state conviction, imposed in 1990, was improperly enhanced through the sentencing judge's reliance upon an earlier 1986 state conviction, which the court of appeals determined was unconstitutional as it was secured as the result of ineffective assistance of counsel at Coss' 1986 trial. Accordingly, the court of appeals properly vacated the earlier conviction. 204 F.3d 453 (3d Cir. 2000).

Contrary to the state's assertions (or those of its *amici*), Coss was deemed properly "in custody" pursuant to the federal habeas corpus statutes (28 U.S.C. §§2241 *et seq.*) because he was attacking the improper use of his earlier 1986 state conviction to enhance the 1990 sentence he was presently serving, notwithstanding the earlier expiration of the custodial portion of the 1986 sentence.

Neither *Maleng v. Cook*, 490 U.S. 488 (1989) nor *Custis v. United States*, 511 U.S. 485 (1994) vitiate the authority of the federal courts to entertain habeas corpus petitions attacking a state prisoner's present incarceration where he seeks to attack the constitutionality of an earlier conviction which is used to enhance the current sentence he is presently serving. Nor have the recent Congressional amendments to the federal habeas corpus statutes altered in any respect the definition of "custody" which this Court has carefully crafted over the last forty years.

A. *Maleng* Properly Permits Federal Collateral Attack On Prior Convictions Used To Enhance Current Incarceration

In *Maleng v. Cook*, this Court broadly construed the "in custody" requirement for federal habeas corpus where a prisoner's present sentence was enhanced by a prior unconstitutional conviction. It found custody whenever "petitioner suffers [some] present restraint from a conviction." 490 U.S. at 492. While it held that federal courts no longer have jurisdiction to entertain petitions directly attacking fully-expired convictions and sentences, even when they are used to enhance subsequent sentences (*id.* at 492), *Maleng* nonetheless "left open the possibility ... that the conviction underlying the expired sentence might [still] be subject to challenge in a collateral attack upon the subsequent sentence that the expired sentence was used to enhance." *Garlotte v. Fordice*, 515 U.S. 39, 45 n.4 (1995)(*citing Maleng*, 490 U.S. at 494). *See also Custis v. United States*, 511 U.S. at 512 & n.7 (Souter, J., joined by Blackmun & Stevens, JJ., dissenting)(majority opinion "does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent that it was lengthened by a prior unconstitutional conviction.")

This has been the near universal holding of the courts of appeals as well. *See, e.g., United States v. Clark*, 203 F.3d 358, 364 (5th Cir. 2000)("Courts of Appeals have uniformly answered ... question [left open in *Maleng*] in the affirmative: as long as the habeas relief sought is framed as an attack on a present sentence, as to which the prisoner is still 'in custody', then the expired conviction used to enhance that sentence may be challenged" (collecting cases)). *See also Tredway v. Farley*, 35 F.3d 288, 292 (7th Cir. 1994)("Because a person currently serving a sentence that was enhanced on the basis of a prior conviction is still in custody, he may challenge the enhancing conviction as

constitutionally invalid even though the prior conviction's original custodial term has expired")(*quoting Smith v. Farley*, 25 F.3d 1363, 1365-66 (7th Cir. 1994).

In the present case, the court of appeals made a finding that the state trial judge sentencing Coss in his 1990 case specifically invoked the earlier 1986 conviction in passing sentence on the latter conviction. 204 F.3d at 460. That was enough, the court of appeals correctly held, to allow Coss to attack his earlier conviction in the context of his later (present) incarceration, invoking this Court's decision in *United States v. Tucker*, 404 U.S. 443 (1972), which held, under analogous circumstances, that a prisoner could attack an unconstitutional prior conviction, even if he had served the earlier sentence in its entirety, so long as that earlier conviction had an enhancing impact on the sentence he was presently serving. *Id.* at 460.

Neither the state nor its *amici* have presented any valid legal basis for challenging this Court's ruling in *Maleng* other than their usual discomfiture at allowing an inmate the use of a federal forum in which to challenge a state conviction. Indeed, contrary to *amici*'s assertions (St. *Amici* Br. 9-12), both the district court and the court of appeals quite properly construed Coss' federal petition as an attack on his 1990 conviction insofar as it was enhanced by the earlier 1986 conviction. 204 F.3d at 459-60. That characterization fit precisely the distinction drawn in *Maleng* between attacks on expired convictions, on the one hand, and an attack on a later conviction enhanced by an (otherwise) expired conviction. 489 U.S. at 493.

B. *Custis* Does Not Preclude Federal Collateral Attack On Prior Convictions Used To Enhance Current Incarceration Where The Earlier Conviction Is Attacked For Constitutional Defects Directly Related To Factual Accuracy

The state argues that *Custis* should be read to preclude all federal post-conviction attack on convictions later used to enhance subsequent sentences in state or federal court. *Custis* does no such thing. It is a federal sentencing case which leaves undisturbed existing federal post-conviction remedies.

In *Custis*, this Court construed a federal sentencing provision under the Armed Career Criminal Act (ACCA), in which it considered the availability during federal sentencing proceedings of collateral attacks on prior convictions that may serve as the basis for sentence enhancement under the ACCA. The Court held that Congress did not intend to permit defendants to challenge the validity of earlier convictions at federal sentencing hearings, except where the convictions were obtained in violation of the right to counsel, contrary to *Gideon v. Wainwright*, 372 U.S. 335 (1963), as well such cases as *United States v. Tucker, supra*, and *Burgett v. Texas*, 389 U.S. 109 (1967).

Whether *Custis* may properly be applied outside of the federal sentencing context so as to preclude all federal post-conviction review of enhanced sentences is another matter entirely. Indeed, Justice Ginsburg, who concurred in the *Custis* holding, has nevertheless stated that "*Custis* presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity." *Nichols v. United States*, 511 U.S. 738, 765 (1994)(Ginsburg, J., dissenting).

The overwhelming majority of courts of appeals that have considered the question have held that *Custis* does not – and should not – preclude a federal habeas challenge to the constitutional validity of a prior conviction – on other than *Gideon* grounds -- on which a later sentence enhancement was based. *See, e.g., United States v. Clark*, 203 F.3d 358, 365-70 (5th Cir. 2000)(and cases collected therein); *Brock v. Weston*, 31 F.3d 887, 890-91 ((9th Cir. 1994)(*Custis* does not

preclude §2254 challenge to fully served convictions used to enhance current state confinement). In *Young v. Vaughn*, 83 F.3d 72 (3d Cir. 1996), the Third Circuit put the matter thus (*id.* at 77): "[I]f a general principle is to be derived from *Custis*, it is the much narrower one that 'federal sentencing hearings are not the proper forum for addressing the validity of prior convictions.'"

In *United States v. Tucker*, this Court vacated a conviction on federal post-conviction review and remanded for resentencing because two of the convictions used to enhance the defendant's federal sentence had been obtained in violation of *Gideon*. 404 U.S. at 446-49.

More importantly, for present purposes, the Court also justified its decision by noting that the defendant's sentence was imposed "in part upon misinformation of constitutional magnitude." *Id.* at 447. The Court relied on *Townsend v. Burke*, 334 U.S. 736 (1949) for the proposition that a defendant may not be sentenced on the basis of inaccurate information. *See id.* at 740-41 (defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue" and such a result was "inconsistent with due process of law"). *See also Zant v. Stephens*, 462 U.S. 862, 887 n.23 (1983)("[a]s we held in *United States v. Tucker* ... the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed").

Indeed, the courts of appeals have properly read *Townsend, Tucker* and their progeny to allow challenges based upon constitutional violations beyond facial *Gideon* violations, including – as in this case – ineffective assistance of counsel.

While the outright denial of a defendant's sixth amendment right to trial counsel is perhaps the clearest

example of a constitutional defect that undermines the factual reliability of the resulting verdict, ineffective assistance of counsel is a second example of a constitutional defect that calls defendant's factual guilt of the prior offense into question. *United States v. Cronic*, 466 U.S. 648, 653-57 (1984)(where a defendant has a right to counsel, he also has a right to have that counsel's performance be competent); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)("It has long been recognized that the right to counsel is the right to effective assistance of counsel"). This is because an ineffective attorney may fail to present relevant facts or raise relevant defenses that would exculpate the defendant. *Cronic*, 466 U.S. at 654-57. Indeed that is precisely what the court of appeals found had occurred in this very case. 204 F.3d at 462-64. *See especially United States v. Brown*, 610 F.2d 672, 674-75 (9th Cir.1980)(*Tucker* extended to ineffective assistance of counsel claims).

Clearly, prior convictions unconstitutional on grounds that affect the accurate ascertainment of factual guilt constitute "misinformation of constitutional magnitude" within the meaning of *Townsend* and *Tucker*. This is because such convictions are not reliable indicators of past criminality and hence may misrepresent the defendant's criminal history. *See Lewis v. United States v. United States*, 445 U.S. 55, 67 (1980)(explaining that the collateral use of an uncounseled conviction for sentence enhancement in *Tucker* "depended upon the reliability" of that conviction). Consequently, the due process clause forbids the use of such convictions for sentence enhancement. Moreover, given the *Tucker* Court's reasoning that use of a *Gideon*-violative prior conviction contravenes the sixth amendment, it follows that the enhancement use of a prior conviction invalid on grounds directly related to factual accuracy also contravenes the constitutional right infringed in the earlier prosecution, in this case, the Sixth Amendment right to effective assistance of counsel. 404 U.S. at 447.

Nor is the seeming revival of the decades-old jurisdictional defect theory suggested in *Custis* relevant here. *Compare* 511 U.S. at 496 *with id.*, at 508-09 (Souter, Blackmun & Stevens, JJ., dissenting). Whatever limitations this Court has determined that Congress has imposed in the interest of the efficient administration of federal sentencing schemes, they have no relevance in the entirely separate realm of federal post-conviction review, which has entirely different institutional considerations. *Custis*, accordingly, a federal sentencing case, in no respects limits the range of claims that may be pursued on federal habeas corpus review.

C. AEDPA Has No Application To This Case

Contrary to the state's assertions (Pet. Br. 10-14), the recently-enacted provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) have no application to this case. First, Coss' federal habeas petition was filed in the district court prior to AEDPA's effective date. Second, in any event, the new statute makes no change whatever in the otherwise judicially-crafted definition of "custody" as that term has come to be understood in such cases as *Maleng, Garlotte, Spencer v. Kemna*, 523 U.S. 1 (1998); *Carafas v. LaVallee*, 391 U.S. 234 (1968); and *Jones v. Cunningham*, 371 U.S. 236 (1963).

First, the court of appeals specifically held that Coss' original federal habeas petition and its first amendment were filed prior to AEDPA's effective date of April 24, 1996. 204 F.3d at 461. The second amended petition, filed at the district court's invitation in November 1996, added no new claims and merely deleted those claims in the first petition that the district court concluded were unexhausted. *Id.* Accordingly, both the district court and the court of appeals

properly construed Coss' federal petition as having raised its substantive claims prior to AEDPA's effective date. That finding is clearly correct under this Court's authorities. *See, e.g., Slack v. McDaniel*, 120 S.Ct. 1595, 1605 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); and *Lindh v. Murphy*, 521 U.S. 320 (1997).

Second, and equally important, Congress did not change or amend in any way the otherwise judicially-crafted definition of "custody" as it is understood under the federal courts' habeas corpus jurisdiction over prisoners when it amended the habeas statutes via AEDPA in 1996. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992)(where Congress re-enacts statutory language that courts have interpreted in a particular way, the inference is that Congress intended to adopt the established judicial interpretation); *Pierce v. Underwood*, 487 U.S. 552, 567-68 (1988)(accord); *General Motors Corp v. Devex Corp.*, 461 U.S. 648, 653-54 (1983)(accord). *See also Merrill Lynch Pierce Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982)(where Congress adopts a new law incorporating sections of prior law, it is presumed to know the interpretation given prior law); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(where words are employed in a statute which had at the time a well-known meaning at common law, they are presumed to have been used in that same sense unless context compels contrary interpretation); *Agosto v. INS*, 436 U.S. 748, 754 (1978)(accord).

As enacted by Congress in 1996, AEDPA contains no definitional sections and in no other respect creates a statutory definition for the term "custody" as that term is employed in 28 U.S.C. §§2241, 2254 & 2255. While the state cites amended section 2244(d)(1) as creating a one-year statute of limitation for filing a federal writ by a prisoner in state custody, the statutory scheme in no other respect addresses the issue of precluding federal relief where a (federally time-barred) conviction is used to enhance the

punishment imposed on a later conviction, which is properly under timely collateral attack. Under these circumstances, it may hardly be said that Congress has spoken with sufficient clarity of an intention to overrule an undeviating line of cases from this Court over the past forty years that have defined and construed custody well beyond the bounds of mere physical imprisonment.

Viewed in terms of statutory construction, it is axiomatic that it will not be lightly inferred that Congress, in revising and consolidating the laws, intended to make a significant change in those laws, unless that intention is clearly expressed. *See Muniz v. Hoffman*, 422 U.S. 454, 472 (1975). Moreover, this Court has determined that, in the absence of contrary indications, it is logical to conclude that Congress intended statutory terms to have the same meaning in an amended statute. *United States v. Kozminski*, 487 U.S. 931, 945 (1988). Indeed, where, as here, Congress adopts a new law incorporating sections of prior law, it is presumed to know the interpretation given prior law. *See generally Merrill Lynch; Lorillard.*[2]

Here, there is no indication that Congress intended to alter or amend this Court's carefully crafted analysis of custody as developed in *Jones, Carafas, Hensley v. Municpal Court*, 411 U.S. 345 (1973); *Braden v. Thirtieth Judicial Circuit Court*, 410 U.S. 484 (1973), *Maleng, Garlotte* and *Spencer*. Indeed, AEDPA is silent with respect to any specific definition of "custody". Under the circumstances, it

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[2] Indeed, even if AEDPA is consulted merely to "inform" the Court's consideration of the judicially-crafted definition of "custody" (*cf. Felker v. Turpin*, 518 U.S. 651, 662 (1996)), there is nothing contained in the statute, other than the addition of a one-year statute of limitation, that even remotely addresses the question of "custody". Standing alone, that is hardly sufficient to meet the test of a clear expression of Congressional intention to abrogate the otherwise uniform judicial interpretation of custody as this Court has developed it over the past forty years. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985).

may hardly be credibly argues that AEDPA has in any meaningful repect limited or changed this Court's long-standing interpretation.

D. The Lower Courts Properly Excused Exhaustion Based Upon Futility Where The Claim Languished In The State Courts For Seven Years

Notwithstanding the state's having declined to do so, its *amici* attempt to smuggle an issue of exhaustion and procedural default into the case at the eleventh hour. (St. *Amici* Br. 10-11).[3]

Contrary to *amici*'s contentions, the court of appeals (and the district court) properly invoked the futility exception to the preliminary requirement of exhaustion of state remedies on federal habeas review. 204 F.3d at 460-61 & n.8. The court of appeals noted that prior to filing his §2254 petition in federal court, Coss had promptly filed a petition for post-conviction relief on his 1986 conviction in the Pennsylvania state courts under Pennsylvania's Post Conviction Hearing Act. That petition had languished for seven (7) years without any action by the state courts. The court of appeals also noted that in light of Coss' release from custody on the 1986 conviction, he no longer had any effective remedies for state post-conviction relief to attack the earlier conviction – even in the context of an attack on the use of the 1986 conviction to enhance the 1990 sentence. *Id.* at 460 (*citing Commonwealth v. Ahlborn*, 548 Pa. 544,

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[3] As a preliminary matter, it is questionable whether this issue is even properly before the Court. In the first place, the issue was not raised in the lower courts nor as a Question Presented in the petition for certiorari. Nor, for that matter, was it addressed at all in petitioners' merits brief. *Yee v. City of Escondido*, 503 U.S. 519, 533-36 (1992)(failure to raise issue in lower courts or in certiorari petition deemed waiver). *See also Irvine v. California*, 347 U.S. 128, 129 (1954)("We disapprove the practice of smuggling additional questions into a case after we grant certiorari").

699 A.2d 718 (1997)). *Ahlborn* construed Pennsylvania's newly-enacted Post Conviction Relief Act as precluding *Tucker*-type post-conviction challenges to sentences based on unconstitutional prior convictions where the defendant is no longer in custody on the prior conviction. Accordingly, because there was no available state process which allowed Coss to challenge the use of the first conviction to enhance the second sentence, the court of appeals correctly excused exhaustion due to the absence of presently available state corrective process. *See Young v. Ragen*, 337 U.S. 235, 238-39 (1949)("The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts ... presupposes that some adequate state remedy exists. ... [P]risoners must be given some clearly defined method by which they may raise claims of denial of federal rights").

Under the circumstances, Coss was excused from exhaustion on the basis of futility in the absence of available state judicial remedies. Nor had he committed a procedural default in the course of his earlier futile attempts to litigate his claims in the state courts, only to be ignored for seven years.[4] This was clearly a case in which the state prisoner, rather than the remedy, was the one being exhausted. *See Marino v. Ragen*, 332 U.S. 561, 568 (1947)(Rutledge, J., concurring).

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[4] The court of appeals interpreted the Pennsylvania Supreme Court's decision in *Ahlborn* not as erecting a procedural bar but merely as a statement that there is no post-conviction remedy under Pennsylvania law for the type of claim raised by Coss. 204 F.3d at 460 n.8. Neither the state nor *amici* have cited any authority to the contrary. Plainly, this is precisely the kind of state law question in which, absent countervailing authority, this Court should defer to the greater familiarity of the *en banc* Third Circuit on questions of Pennsylvania law. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *see also id.* at 547 (O'Connor, J., dissenting); *DeBuono v. NYSA-ILA Medical and Clin. Serv.*, 520 U.S. 806, 812 (1997); *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997)(accord).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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